



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

BRUCE BORRELLI,
Petitioner,

vs.

THE STATE OF ILLINOIS,
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

The opinions of the courts below.

The opinions of the Supreme Court of Illinois are in the record (pp. 7, 21) and the final opinion is reported in 392 Ill. 481, 64 N. E. (2) 719. The trial court rendered opinions (Abst. 139, 238, 274, 276). The Appellate Court opinion is abstracted in 323 Ill. App. 280, and the opinion of the Supreme Court of Illinois in the order of transfer to the Appellate Court is reported in 383 Ill. 17.

JURISDICTION.

The final judgment of the Supreme Court of Illinois was entered January 17, 1946. The jurisdiction of this court is invoked under section 347 of Title 28, United States Code. Judicial Code, Section 240(a) as amended by the Act of February 13, 1925, 43 Stat. 936, Ch. 229. Appendix to Rules, 306 U.S. 727, 731. Rules of the Supreme Court, particularly Rule 38, 306 U.S. 716. Rule XI of the Rules for Criminal Appeals promulgated May 7, 1934.

STATEMENT OF THE CASE.

Reference is made to our petition herein under the heading "Summary Statement of Matter Involved."

ERRORS TO BE URGED.

Reference is made to our petition.

QUESTIONS PRESENTED.

Reference is made to our petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourteenth Amendment to the Constitution of the United States.

PROPOSITIONS OF LAW RELIED ON AND
CITATION OF CASES.

I.

Whether a confession is voluntary depends upon the facts of each case. A confession cannot be said to have been freely and voluntarily given where the evident purpose of the interrogation was not for the prosecution of the confessor but to use him as a witness for the prosecution of another whom the confession implicates.

People v. Vinci, 295 Ill. 419.

II.

Where an original confession is involuntary or secured by improper means, subsequent confessions of the same crime, though made to persons other than those to whom the original was made, are not admissible in evidence unless it appears that from lapse of time, or otherwise, the influence which induced the original confession had been removed and the party confessing was no longer dominated by such influence, as the presumption is, in the absence of proof to the contrary, that a second confession was the product of the same influence.

People v. Sweetin, 325 Ill. 245.

III.

If the specific facts testified to by the plaintiff in error are true the alleged confession was not made voluntarily.

In the condition of this record they must be so regarded, since they were not met by any denial.

People v. Holick, 337 Ill. 333, 338.

People v. Spranger, 314 Ill. 602.

People v. Sweeney, 304 Ill. 502.

People v. Rogers, 303 Ill. 578.

People v. Davis, 269 Ill. 256.

IV.

If tricks, falsehoods and deception employed by police and prosecutors are calculated to bring about a false confession the confession so obtained is inadmissible.

Wigmore on Evidence, Vol. III (Third Ed.), sec. 841, p. 281.

State v. Green, 273 P. 381, 128 Or. 49.

V.

The question is not whether the persons making the promises were persons in authority, that is, capable of performing their promises, but were they in such a situation that the person confessing might reasonably consider them as able to do so.

State v. Foster, 183 P. 397, 25 N. M. 361, 7 A.L.R. 417.

Clark v. State, 45 S. W. (2d) 575, 119 Tex. Cr. 50.

Hanus v. State, 286 S. W. 218, 104 Tex. Cr. 543.

VI.

All conscious verbal utterances are and must be voluntary; and that which may impel us to distrust one is not the circumstance that it is involuntary, but the circum-

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stance that the choice of false confession is a natural one under the conditions. The choice of false confession is voluntary, but the false confession is associated with a prospect (namely, of escape from present harm) so tempting that it is not in human nature to resist it.

Wigmore on Evidence, Vol. III, 3rd Ed., sec. 841, p. 251.

VII.

As between the rack and a false confession, the later would usually be considered the less disagreeable, but it is none the less voluntarily chosen.

Wigmore on Evidence, Vol. III, 3rd Ed., sec. 841, p. 251.

VIII.

Thus where a promise (for example of pardon) is the inducement for a confession, its effect is to make the certain freedom which will accompany a false confession more attractive at the moment than the mere possibilities of freedom, coupled with temporary restraint, which attended silence.

Wigmore on Evidence, Vol. III, 3rd Ed., sec. 841, p. 251.

IX.

A very slight probability of untruth, to be sure, is sufficient to exclude (a probability much less than that which supports other testimonial exclusions) and the tests worked out are often more or less artificial; but this principle underlies the whole body of rules.

Wigmore on Evidence, 3rd Ed., sec. 856.

X.

It is a well established general rule, that a confession of guilt by accused is admissible against him when, and only when, it was freely and voluntarily made without having been induced by the expectation of any promised benefit, or by the fear of any threatened injury, or by the exertion of any improper influence.

People v. Goldblatt, 383 Ill. 176.

People v. Ardelean, 368 Ill. 274.

People v. Campbell, 359 Ill. 286.

People v. Basile, 356 Ill. 171.

People v. Cope, 345 Ill. 278.

People v. Fudge, 342 Ill. 574.

People v. Bartz, 342 Ill. 56.

People v. Holick, 337 Ill. 333.

People v. Shroyer, 336 Ill. 324.

People v. Reed, 333 Ill. 397.

People v. Ziderowski, 325 Ill. 232.

People v. Fox, 319 Ill. 606.

People v. Kircher, 309 Ill. 500.

People v. Klyczek, 307 Ill. 150.

People v. Sweeney, 304 Ill. 502.

People v. Heide, 302 Ill. 624.

People v. Vinci, 295 Ill. 419.

People v. Campbell, 282 Ill. 614.

Ziang Sung Wan v. United States, 266 U. S. 1.

Jones v. State, 98 So. 150, 155.

XI.

Whether a confession is voluntary or, in other words, testimonially worthy, depends largely upon the facts of the particular case, and his surroundings, as well as the nature, content and import of the confession itself.

People v. Campbell, 282 Ill. 614.

People v. Klyczek, 307 Ill. 150.

State v. Johnson, 95 Utah 572, 83 P. (2d) 1010.

XII.

Involuntary confessions are rejected, not because of the illegal or deceitful methods which may have been employed in securing them, but because they are testimonially unreliable and untrustworthy.

People v. Fox, 319 Ill. 606.

People v. Barber, 342 Ill. 185.

State v. Green, 128 Oregon 49, 273 P. 381.

XIII.

The practice of taking into custody and detaining persons merely suspected of crime, for the purpose of extorting confessions from them, is condemned by the courts; and in determining whether or not a confession was made voluntarily, it is proper to take such illegal practice into consideration.

People v. Vinci, 295 Ill. 419.

People v. Klyczek, 307 Ill. 150.

People v. Goldblatt, 383 Ill. 176.

XIV.

It is well settled that a confession will not be excluded because of a mere exhortation or adjuration to speak the truth. On the question whether an exhortation accompanied by an expression that it would be better for accused to speak the truth is sufficient alone to exclude a confession, the authorities are divided, some holding that it is, and others that it is not. The real question is whether the language used in regard to speaking the truth, when taken in connection with the attending circumstances and with other language spoken in the same or in some prior interview, shows that the confession was under the influence of some threat or promise, the confession being inadmissible where it was made under such influence.

People v. Klyczek, 307 Ill. 150.

People v. Heide, 302 Ill. 624.

People v. Vinci, 295 Ill. 419.

People v. Phillips, 42 N. Y. 200.

XV.

Confessions made by accused under the promise or encouragement of any hope, benefit, or favor made or held out to him by officers or other persons in authority, or by a private person in their presence, are not voluntary, and therefore are inadmissible.

People v. Campbell, 359 Ill. 286.

People v. Holick, 337 Ill. 333.

People v. Stokes, 334 Ill. 200.

People v. Swift, 319 Ill. 359.

XVI.

A confession is inadmissible if induced by a promise, express or implied, that if accused would confess efforts would be made to mitigate his punishment; by a promise of immunity from prosecution or punishment; by the promise of the prosecuting officer to discontinue the prosecution.

People v. Martorano, 359 Ill. 258.

People v. Knox, 302 Ill. 471.

People v. Andrae, 305 Ill. 530.

People v. Buckminster, 274 Ill. 435.

XVII.

Confessions made to persons in authority are presumed to have been produced by any promises they may have made to induce the confessions.

Lucas v. State, 221 P. 798, 26 Okl. Cr. 23.

Mays v. State, 197 P. 1064, 19 Okl. Cr. 102.

State v. Green, 273 P. 381, 128 Or. 49.

State v. Lord, 84 P. (2d) 80, 42 N. M. 638.

Rowan v. State, 49 P. (2d) 791, 5 Okl. Cr. 345.

XVIII.

An inducement to a confession held out by a private person in the presence of one in authority, and not expressly contradicted or rejected by such person, will exclude a confession based upon it, since it is the same in legal effect as if the inducement were held out by the one in authority.

Rowan v. State, 49 P. (2d) 791, 57 Okl. Cr. 345.

Hanus v. State, 286 S. W. 218, 104 Tex. Cr. 543.

People v. Reilly, 169 N. Y. S. 119, 181 App. Div. 522, 36 N. Y. Cr. 248, affirmed 120 N. E. 113, 224 N. Y. 90.

XIX.

A confession obtained by promise or hope of reward is not admissible in evidence, and if a confession is secured by hope of leniency the law presumes that it was induced by such promises, as in such case the law cannot measure the force of the influence used nor decide upon the effect such promises may have had on the mind of the prisoner.

People v. Campbell, 359 Ill. 286.

XX.

Prosecuting attorneys, their agents, and authorized investigators are generally held to be "persons in authority," so that the confessions induced by a promise of immunity held out by them are inadmissible in evidence.

People v. Buckminster, 274 Ill. 435.

XXI.

However, the question is not whether the persons making the promises were persons in authority, that is capable of performing their promises, but were they in such a situation that the person confessing might reasonably consider them as able to do so.

State v. Foster, 183 P. 397, 25 N. M. 361, 7 A.L.R. 417.

Clark v. State, 45 S. W. (2d) 575, 119 Tex. Cr. 50.

Hanus v. State, 286 S. W. 218, 104 Tex. Cr. 543.

XXII.

A conviction based upon an involuntary confession is void under the due process clause of the fourteenth amendment.

Brown v. Mississippi, 297 U. S. 278.

Chambers v. Florida, 309 U. S. 227.

White v. Texas, 309 U. S. 631, rehearing denied 310 U. S. 530.

XXIII.

If a confession before a grand jury was given involuntarily or under the influence of hope or fear, it is not admissible on the trial.

United States v. Charles (1813), 2 Cranch C. C. 76, Fed. Cas. No. 14,786.

Cooper v. State (1906), 89 Miss. 429, 42 So. 601.

XXIV.

The statements made by Borrelli in the immunity waiver are of no weight, because they are a part of the confession procured by the same means at the same time and subject to the same infirmities.

People v. Sweeney, 304 Ill. 502, 513.

XXV.

It is the general rule both under statutes and at common law that an extrajudicial confession does not warrant a conviction unless it is corroborated by independent evidence of the *corpus delicti*.

People v. Hauck, 362 Ill. 266.

Wistrand v. People, 213 Ill. 72.

XXVI.

More than one person must be guilty to sustain conviction for conspiracy.

People v. LaBow, 282 Ill. 227.

Evans v. People, 90 Ill. 384.

XXVII.

In criminal cases it is not sufficient, to sustain a conviction on a particular charge, to prove that the defendant was guilty of some other charge or of general bad and criminal conduct.

Lowell v. The People, 229 Ill. 227.

XXVIII.

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Art. II, sec. 10, Constitution of 1870.

XXIX.

When the question of former jeopardy is presented at a second trial the question of identity of offenses can be inquired into by an inspection not only of the former judgment but of the pleadings and the evidence and all matters which may disclose the real situation.

Harding Co. v. Harding, 352 Ill. 417.

Neil v. Chavers, 348 Ill. 326.

Petition of Blackledge, 359 Ill. 482.

Hoffman v. Hoffman, 330 Ill. 413.

Smith v. Auld, 31 Kan. 262, 1 Pac. 626, 628.

Davis v. People, 22 Colo. 1, 43 Pac. 122.

XXX.

The test as to whether the facts pleaded or proved constitute a former acquittal or conviction sufficient to bar a subsequent prosecution is whether the facts charged in the later indictment would, if found to be true, have justified a conviction on the earlier indictment. If they do, then the

judgment on the earlier indictment is a complete bar to a prosecution on the other indictment, otherwise not.

People v. Bain, 358 Ill. 177, 190.

People v. Mendelson, 264 Ill. 453.

XXXI.

Under his plea of not guilty the defendant was entitled to prove any defense to the charge including that of former jeopardy and acquittal.

People v. Greenspaw, 346 Ill. 484, 486.

XXXII.

The errors committed deprived the defendant of due process of law as guaranteed by the constitution and laws of the State of Illinois and the fourteenth amendment to the constitution of the United States.

XXXIII.

State Courts equally with Federal Courts are obliged to guard every right secured by the United States Constitution.

Smith v. O'Grady, 312 U. S. 329.

XXXIV.

This court should look beyond mere words of a State Supreme Court opinion in order to protect the rights of a citizen of the United States.

Moore v. Dempsey, 261 U. S. 86.

Mooney v. Holohan, 294 U. S. 103.

Brown v. Mississippi, 297 Ill. 278.

Chambers v. Florida, 309 U. S. 227.

Lisenba v. California, 314 U. S. 219.

White v. Texas, 310 U. S. 530.

ARGUMENT.

MAY IT PLEASE THE COURT:

The Confession.

It is our respectful contention that the confession was induced by the expectation of a promised benefit and is therefore not voluntarily made and is testimonially untrustworthy. There is no claim or suggestion that physical violence was used or threatened as to Borrelli. The trial court expressed itself in a written opinion (Abst. 139) as being of the opinion that promises were made, and this conclusion could not be escaped. The court held, however, that the promises did not, as a matter of law, affect the confession. This finding was made for two reasons, said the court, first, because those made by the father of the defendant were given by a person not in authority and, second, that the promises made by the father and by those in authority were such that only the court had power to carry them out. The trial court held that Bruce Borrelli was bound to know that no one but the court could deliver the promised benefits, therefore Bruce Borrelli had no right to rely upon them. The trial court, we submit, overlooked the fact that the question should have been the effect of the promises, rather than any question as to the ability to deliver the promised benefit. If the trial court is correct on the law, a prosecutor could promise a defendant probation in return for a confession, admit the giving of the promise and yet the court could properly admit the confession, because the prosecutor is supposed not to have the power to bring about probation.

We quote from the final opinion of the Illinois Supreme Court (R. 24):

"It is reasonable to believe that, although no promise was given him, he expected to fare better at the hands of the State's Attorney, to whom the question of his immunity from punishment would be largely committed, if he would appear and testify before the grand jury."

Of course, your Honors will consider all that has been said by our Supreme Court on the subject and we realize that that court is entitled to have your Honors start with the presumption that the facts have been correctly stated in the opinion, but your Honors are not bound by conclusions which find no support in the record (*Moore v. Dempsey*, 261 U. S. 86). We must request a re-examination of the facts in some detail. The trial judge correctly found that promises had been made but failed to apply the law correctly. The Supreme Court states the law correctly but misapprehended the undisputed facts.

Whether a confession is voluntary depends upon the facts of the particular case. The nearest case to the facts here presented is that of *People v. Vinci*, 295 Ill. 419. Here, as there, the prosecutor, in working on the defendant, was endeavoring to secure his services as a witness. See also *People v. Goldblatt*, 383 Ill. 176. In the case at bar, the trial judge in his written opinion said (Abst. 238):

"At times it seemed that we were witnessing a mystery drama rather than a trial, with an accusing finger rotating from one person to another on both sides of the table. These charges and counter-charges grew out of the State's efforts to prosecute an alleged 'higher-up', John L. Keeshin, who was discharged by a jury, who denied any wrongdoing under oath, and whom Bruce Borrelli absolved by his testimony from any implications.

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“State’s Attorney Courtney referred to the defendant as an ‘underling’. Messrs. Crowley and Gilbert designated him as ‘small-fry’. Considering him in that light, the Court finds the defendant, Bruce Borrelli, guilty of statutory conspiracy.”

The trial court in its written opinion said (Abst. 238) that it did “not propose to comment upon all the recriminations.”

Although the prosecutors denied them, the evidence shows two deals offered the defendant by Captain Gilbert, chief of the police on the staff of the prosecutor. The first deal was that if Bruce Borrelli would cause a few of his friends to agree to assume responsibility for the violence and agree to a fine of one hundred dollars each, Borrelli would be permitted to go home, his father’s name (Judge Borrelli’s) wouldn’t be in the newspapers, and that would be the end of the case. Borrelli produced his friends, who agreed to this plan, but Gilbert refused to carry out his part of the deal and Borrelli then refused to cooperate any further and secured his release from the illegal arrest by *habeas corpus*. Then, with the help of Judge Borrelli, Captain Gilbert prevailed upon Borrelli to agree to a new deal under which Borrelli was to testify against Keeshin in exchange for probation or freedom. Borrelli cooperated to the extent of his testimony before the grand jury, but when it became obvious to him from the conduct of the prosecutors that there was danger that this second deal was to be repudiated unless he cooperated to the extent of further and more detailed perjury against Keeshin, concocted by the prosecution, Borrelli refused to be a witness and this prosecution is the result.

The *Vinci* case was reversed, as we understand it, because the Illinois court perceived that the evident purpose of the prosecutors was to use Vinci as a witness against

others. In the case at bar Borrelli does not claim that physical violence was used or threatened as to him. Promises were made to him, he claims, and we contend that under all of the circumstances of the case his confession was involuntary. We contend that a careful study of the details and the circumstances will show the real purpose of the prosecutors and the influences exerted.

In the *Vinci* case the Illinois Supreme Court said (425):

"We do not want to be understood, however, as approving the practice of taking into custody and detaining persons merely suspected of crime for the purpose of getting confessions from them. Such practice deserves the severest censure and has been repeatedly condemned by the courts of this country. In determining whether or not a confession was made voluntarily it is proper to take into consideration the fact of unlawful restraint. (*People v. Trybus*, 219 N. Y. 18, 113 N. E. 538; 16 Corpus Juris, 719.)

* * * *

"While we do not believe any physical force was used nor that direct threats or promises were made, there can be no doubt at all that the repeated questioning by these officers, like the constant dropping of water upon a rock, finally wore through Vinci's mental resolution of silence. Admittedly his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. The examination was persisted in by turns until plaintiff in error finally yielded to the importunities of his questioners and gave answers which they sought. It seems clear to us that the accused became convinced that he was bound to make a statement to secure relief from the continuous questioning of those having him in charge, and under the circumstances we do not see how a confession thus obtained can be said to be voluntary. (*People v. Borello*, 136 Cal. 367, 119 Pac. 500; *People v. Quan Gim Gow* (Cal.), 138 Pac. 918.)"

In the case at bar your Honors will perceive that the violence against the Keeshin employees was perpetrated in

November 1941. Captain Gilbert took statements from the victims and learned that Borrelli was guilty of the assaults on December 2, 1941. Yet Gilbert did not arrest Borrelli until January 12, 1942. And when he did arrest Borrelli he had not secured a warrant. It is obvious that Gilbert from the start adopted a practice which deserves the severest censure and which has been repeatedly condemned by the courts of this country. In *People v. Goldblatt*, 383 Ill. 176, the same officials were shown to have used similar illegal methods.

Borrelli might have withstood repeated and continuous questioning and may not have yielded as did Vinci, but the prosecution was able to bring greater pressure to bear, as we expect to demonstrate. This case is like the *Vinci* case and the *Goldblatt* case in that the prosecutors were determined to secure Borrelli as a witness. We are quite certain that your Honors will conclude here as in the *Vinci* case (427):

“Evidently the object of interrogating plaintiff in error was not to secure from him a voluntary confession with a view to prosecuting him, but the object was to secure from him a statement for the purpose of making him a witness for the prosecution. Aside from the statements of plaintiff in error we think this clearly appears from a consideration of the entire record. During all these hours of questioning, if direct promises of immunity were not made to plaintiff in error, necessarily he understood that if he made statements satisfactory to the State’s Attorney he would thereby receive immunity from prosecution. While such promises, directly or indirectly, would not affect the competency of the accused as a witness for the People, they would affect the admissibility of his statement as a free and voluntary confession. Under all the circumstances we must hold that this confession was not freely and voluntarily given and that the court erred in receiving it in evidence.”

In fact we are quite certain that your Honors will find that promises were made and that the prosecutors were able to wield influence and power against Borrelli for reasons not existing in the *Vinci* case. And above all we expect to demonstrate that the influences were not only calculated to bring forth a false confession but that such was the result, as found by the trial court.

We submit that the trial court permitted the prosecutor to lightly brush aside the first deal, overlooking the rule of law which presumes a second confession to be involuntary if it follows one that is so (*People v. Sweetin*, 325 Ill. 245, 249).

The trial court indicated a lack of interest in the first deal. We submit that there are many circumstances of this case which the trial court failed to consider or give due significance. In the first place, as we have said, it is proper to take into consideration the illegal custody (*People v. Vinci*, 295 Ill. 419). The custody in this case was taken without warrant and as a step in Captain Gilbert's scheme to trap Borrelli into a position where he could be prevailed upon to trade his liberty for testimony against Keeshin. The trial court dismissed all of this outrageous conduct on the part of Captain Gilbert, shown without serious dispute, upon the erroneous assumption that after Borrelli secured bond in the *habeas corpus* proceeding the power and influence of the prosecutor ceased, and Borrelli should have known that their promises could not be fulfilled anyhow, and consequently his confession was voluntary. The court found that Keeshin was not in the conspiracy, although Borrelli confessed that Keeshin was the prime mover. The court overlooked the fact that the falsity of the confession produced by undue influence was not only a potent reason for rejecting it as evidence, but that its falsity gives credence to our claim that the confession was

but a step in the fabrication of a case against Keeshin as these important details are not mentioned by the Illinois Supreme Court, we request that your Honors examine the record for the facts.

It is significant that the injuries received by Milich, Mitchell and Wassell were not reported to the police. They were not reported to anyone in authority for a week. The fact that Mitchell, Milich and Wassell did not report their injuries to the police would not be of much importance if Borrelli were here convicted of injuring them. He admits he did that and their failure to report does not detract from the uncontradicted proof that they were injured. But this is a conviction for conspiracy. When Mitchell, Milich and Wassell neglected to report the matter to the police and then were sent to Captain Gilbert after the trail had grown cold and the labor difficulty had been settled, they placed themselves in the position of discharged employees seeking their jobs or money. This put Gilbert in an unusual position. They told Officer Griffin (Abst. 25) that they didn't wish to sign a complaint. Mitchell was assaulted November 26, 1941 (Abst. 20) and went to the State's Attorney's office December 2, 1941 (Abst. 37). Milich (Abst. 32) and Wassell (Abst. 39) were hit on November 25, 1941. Gottlieb was struck after midnight of January 6, 1942 (Abst. 248). Borrelli was not arrested until January 12 (Abst. 53). So under the circumstances Captain Gilbert was placed in control. He could have dropped their stale complaints without the slightest criticism. So having the victims in his control Captain Gilbert held them in abeyance until he could work out his scheme to destroy Keeshin. We realize that we are requesting your Honors to study this record with care as to details. If we made the naked charge here that the prosecutors were engaged in the prostitution of their office in order to secure perjured testimony

against Keeshin, our claim might be rejected by your Honors because it is almost unbelievable that officials can stoop so low. It is best that we show the facts from the record and this can not be accomplished without detail.

Although Gottlieb knew that Borrelli was his assailant, Gottlieb withheld that information from the police in order to give it exclusively to Captain Gilbert. Gottlieb knew that Borrelli had struck him and gave Gilbert that information on January 7, 1942 (Abst. 250). Milich, Mitchell and Wassell put their cases in the hands of Gilbert at the suggestion of Mrs. McFeeley, with the intention of securing money from Keeshin. Gilbert suppressed his information as to the charges made against Borrelli and had Borrelli shadowed. This, Gilbert said on the stand (Abst. 79), was done in order that he might arrest Borrelli with some of his accomplices. So it is clear from his own testimony that Gilbert violated the law in arresting Borrelli without a warrant. Our Supreme Court said in *People v. Martin*, 382 Ill. 192, 202:

“These violations of the law appear more deliberate when it is considered the State’s Attorney’s office had knowledge upon which it could base a search warrant at least seven days before the first illegal seizure.”

It is only fair to our present State’s Attorney to say that our administration has changed since this case was prosecuted below.

We contend that a study of the entire record will show that Gilbert and the prosecutor regarded the injuries to the Keeshin employees in themselves to be a minor matter and of no importance unless the responsibility of Keeshin could be established.

The so-called strike only lasted a few minutes when it was adjusted. It is common knowledge that criminal

charges of assault are often discontinued after the settlement of labor troubles. Gilbert denies the promises made in the first deal, but we ask why Borrelli would bother to go out the back way if Borrelli thought he was to be brought back to the office of the State's Attorney and locked up? The newspapers would get it then and his sneak would only delay the blast until the morning papers came out. Borrelli's actions and words, if they are as he relates, confirm the first promise as testified to by him. After Borrelli secured Roche and LaBarbera in the restaurant, Borrelli asked Officer Kelly for his gun and said he'd go home (Abst. 52). (Borrelli carried a gun when arrested. He was a Municipal Court bailiff.) Did Kelly say that Borrelli was crazy to make any such request and that he was a prisoner? No, Kelly said that he'd have to phone Gilbert. Here is the testimony of Borrelli (Abst. 51):

"I explained the deal that Captain Gilbert offered me and eventually they (Roche and LaBarbera) agreed to it. I went over and told the officers it was all right; we were there quite a while before I told the officers. The officers were having their dinner while I was talking to the two men. We all went out the same door when we left there, but didn't go together. They were taken in custody, Kelly told me to turn, go and walk out on the corner of the street, there would be a car there, and that I should get in the car and the others would soon be out. I said, 'All right, then, O. K., Tom, give me my gun back and let me go home.' At the time I was arrested I was permitted to carry a gun as a bailiff of the Municipal Court. Kelly said, 'Wait, I will call Gilbert.' I said, 'Where are you going to call him? You told him (Gilbert). when we got over here I would be let go.' He said, 'I will talk to Gilbert first. It will take only a minute to talk to Gilbert.' I says, 'What about it?' He says, 'When we get back over, well, we will let you go.'"

Kelly was not produced to deny this, neither were any of the officers who were with Kelly on that night.

The absence of Kelly from the stand should have been regarded as an admission of the truth of Borrelli's account of the first deal. The record shows that the trial judge sent for Judge Borrelli in order that the court might have the benefit of his testimony (Abst. 68, 100). Judge Borrelli was not a party to the first deal and, as we have said, the trial court failed to perceive the importance of compelling a thorough investigation concerning the first deal. The desire of the State to conceal the details of the first deal can well be understood, but the confession was improperly admitted in the absence of a full inquiry. Gilbert testified (Abst. 81):

"I didn't go out with Borrelli to pick up these men that night. I left instructions for him to be taken out about 11 or 11:30. I left instructions to keep Borrelli in custody and return him to our office with whatever other men were apprehended."

The record shows that whatever instructions were given by Gilbert were given to Kelly. Can your Honors conceive of any reason but guilt upon the part of Gilbert and Kelly which would cause the prosecution not to call Kelly as a witness? Of course, Kelly would have had a difficult time explaining a great many of the proven facts without admitting the existence of the first deal.

Judge Borrelli testified (Abst. 74):

"I don't mean physically, I mean mentally, the way they kept after him for hours. I went down at 11:30 and I couldn't see my son. Everybody fooled me around this building."

If the trip down the fire escape was made at the request of Borrelli in order that Roche and LaBarbera would not know that Borrelli was the first to talk, why was it necessary to fool Judge Borrelli? Why should the officers under Kelly allow Borrelli to confer with Roche and LaBarbera

in the restaurant by themselves when they wouldn't permit Bruce Borrelli to talk to his own father in the office of the State's Attorney? What was there for Borrelli to explain to Roche and McNally, if there was no deal on foot and Borrelli was merely concealing the fact that he had been arrested and had given information to Gilbert? The fact alone that the police brought Borrelli out to meet Roche and McNally would be enough to advertise the co-operation of Borrelli and the police. The explanation given to the trial court in the case at bar by Gilbert is preposterous.

If the trial court had not failed to see the importance of a full investigation into the first deal, the court no doubt would have demanded that the prosecutors bring Kelly up from their office. Gilbert testified (Abst. 78) to a confession which was part of the first deal. The court overlooked cases such as *People v. Sweetin*, 325 Ill. 245, holding that where an original confession is involuntary or secured by improper means, subsequent confessions of the same crime, though made to persons other than those to whom the original was made, are not admissible in evidence.

Captain Gilbert gave the court a story (Abst. 81) which he no doubt thought to be a clever adaptation of the known facts in explanation of his orders to Kelly that Borrelli was to be taken down the fire escape. Fortunately we can prove out of Gilbert's own mouth that his explanation is false.

Wharton in his work on evidence (Wharton's Evidence in Criminal Cases, Tenth Ed., Vol. II, p. 1318, sec. 635) states that the trial attorney is familiar with the ramifications of political and system influence, with interlaced political interests and is aware that:

"Convictions are sought in all cases, with no thought

of protecting the innocent, but as questions of expediency that must correspond with and prove the theory of the prosecution and the sagacity of the arresting officers."

Gilbert told the trial judge that he told Borrelli that he had had him followed for three weeks and knew everywhere he went and whom he met (Abst. 53). Borrelli was arrested January 12 (Abst. 53). Gottlieb was assaulted January 7 (Abst. 248). If Gilbert's men were following Borrelli and witnessed this assault, Gilbert has suppressed this evidence, for it does not appear. If Gilbert invented the story about having Borrelli followed Gilbert did not admit that it was fiction.

Gilbert testified that Borrelli then told him (Gilbert) the names of the guilty parties, but that Borrelli said that he didn't want anyone to think that he was a stool pigeon and had been the first to tell. So Gilbert claims that the fire escape trip was at the suggestion of Borrelli in order that Borrelli might conceal from the other defendants that Borrelli had told on them. How this maneuver would conceal such fact, if it were a fact, when the victims were to see Borrelli leading the police to a rendezvous arranged a few minutes before on the phone by Borrelli, is not explained by Gilbert. Neither does Gilbert explain why, after Gilbert had the names from Borrelli and in view of the fact that he knew who these parties were from his investigation, Gilbert didn't just send out his police and arrest these men. Why did Gilbert have to be a party to all of these maneuvers if only to help Borrelli? Anyhow, all of this explanation on the part of Gilbert is shown to be false by the following, which we quote from Gilbert's testimony (Abst. 81):

"That was about 7:30 and I had him go back to the squad room in company with Lieutenant Kelly

and instructed him (Kelly) to go with Borrelli about 11 or 12 o'clock to whatever place he directed and then to pick up these other fellows. He gave me some nicknames and gave me the name of LaBarbera, and he gave me the name of a fellow named Loren, and he didn't know the other fellow's name, but he knew him well, and he knew the fellow that was arrested with him, the fellow named McNally. I said to him, 'Well, now, Bud, this fellow McNally is in here,' and I said, 'I have talked with him, and McNally said he never was with you, didn't know anything about the slugging down at the dock down there.' Borrelli said, 'McNally will talk,' Borrelli said, 'bring him in and I will tell him to talk.' So I went for McNally and we brought him and Borrelli together, McNally in my office, and he said to McNally, 'Say now listen, I have told the Captain all about you, and I have named each in it, and now I want you to go ahead and make a statement and everything else.' McNally said, 'Oh, for the love of God, it sticks in my head to think I would have to turn out to be a stool pigeon, I would have never talked but you want me to, now I will tell the story,' and I says all right."

So Captain Gilbert would have us believe that Borrelli, after naming his companions and scheming to go down the back way in order to conceal the fact that Borrelli had told on his companions, blurted right out to McNally (Abst. 81):

"Say now, listen, I have told the Captain all about you, and I have named each in it, and now I want you to go ahead and make a statement and everything else."

If Borrelli had ever said any such thing to McNally isn't it fair to conclude that the State would have compelled McNally to so testify before giving McNally his reward? No such thing ever happened except in the fertile imagination of Captain Gilbert. In considering these inventions made by Captain Gilbert your Honors will note

that McNally was not indicted in the case we are considering.

It is also significant that although Captain Gilbert testified that Borrelli told McNally that he (Borrelli) had told Gilbert all about it, Gilbert does not testify that Borrelli had in fact told all about it. The alleged conversation with McNally is an invention of Gilbert's and does not fit in with the known facts.

Your Honors will note that Gilbert now claims that the only reason for the fire escape trip was that Borrelli would not be able to get in touch with Roche and LaBarbera until eleven or twelve. (Abst. 80)

After Borrelli carried out his part, according to Gilbert (Abst. 82), Borrelli said:

“ ‘I was responsible for getting these fellows, what are you going to do for me?’ ”

Why should Borrelli think for a moment that he had a reward coming to him if Gilbert had told Borrelli that he, Gilbert, knew all about Borrelli's activities and who the parties were who were with Borrelli, and if Borrelli had admitted his part and named the men? How could Borrelli be expected to claim any reward if he merely facilitated the arrest of Roche and LaBarbera which could have been made without any trip down the fire escape and without any long conference with the persons to be arrested? The police, as everyone knows, make the arrest and do their questioning in headquarters under the circumstances claimed by Gilbert.

Although we asked for a full investigation, including the statements taken from the other defendants, McNally's statement was suppressed. If it were made at the suggestion of Borrelli it could have been introduced without demand for it, as part of the *res gestae*. Its absence means

that there is no such statement, or its absence here means that McNally's statement contradicts Gilbert and destroys the theory of the State.

Gilbert testified (Abst. 82):

"I returned to the office that night about twelve o'clock. Borrelli was back at that time and two other men were there, LaBarbera and Roche. Borrelli and I went into Mr. Crowley's office about two o'clock that morning and Mr. Crowley was there. Prior to going in there I brought Borrelli into the presence of these two men and read their statements to him, the statements they had made, and told him they told all about being with him, and Borrelli said that 'I was responsible for getting these fellows, what are you going to do for me?'"

Your Honors know that the prosecutors knew that under the law if Gilbert read the statements of Roche and LaBarbera to Borrelli involving Borrelli, and Borrelli did not deny their truth, the statements were admissible in this trial against Borrelli. The absence of the statements is significant.

The law holds that because deception is used, deception alone on the part of the police will not invalidate an otherwise voluntary confession. We contend that the means employed by Captain Gilbert were intended by him to procure an untrue statement, and the evidence shows that the confession finally obtained was in fact false, and the trial judge so found.

The deception practiced by Gilbert on Borrelli can not be dismissed as immaterial, under the authorities, for the reason that it was calculated to bring about the false confession shown by the record. Also the credibility of Gilbert as a witness is an important factor to be considered. We contend that his conduct does not commend him as truthful. To him it all may have been a game and the end

may have justified the means, but courts can not be expected to approve such conduct. It should be condemned here.

The testimony of Gilbert is not only false, but your Honors know that if the truth could not hurt them the prosecutors would have welcomed a full investigation. If Kelly took Borrelli down the fire escape at the request of Borrelli, merely to conceal from his companions that he had given information, Kelly could have corroborated Gilbert. And, as we have asked before, if the fire escape trip was made for that purpose why should the officers eat their dinner and permit Borrelli, LaBarbera and Roche to hold a long conference in a different part of the restaurant where the officers could not hear the conversation?

Your Honors will find all through the record, including that given for the State, that Borrelli asked at every opportunity and every time he was requested to do something for the State, "What about me?" The prosecutors would have us believe now that in answer to each inquiry Borrelli was firmly told that he was to get nothing, and yet Borrelli went along with them, confessed and agreed to become a witness for the State.

It must be remembered in this connection that Borrelli did strike Milich, Mitchell and Wassell. He does not deny that fact here. (Same as to Gottlieb in the other case.) So when Gilbert told Borrelli that Gilbert knew this to be a fact and that Milich, Mitchell and Wassell had been in and had made statements against Borrelli, Borrelli knew that he was in danger of a prosecution. Borrelli wished to avoid not only prosecution, but he realized that the charge alone would bring his father unfavorable publicity. Having been a court bailiff and having known Gilbert for years, Borrelli knew, of course, that such minor cases could

be settled out of court. Borrelli had every reason to rely upon Gilbert, and Borrelli can not be blamed for not anticipating that Gilbert would not only break his word but would deny having such a deal. On behalf of Gilbert the circumstances might suggest that if Borrelli had testified for the State, the deals would have been kept by the prosecution. But testimony for the State was no part of the original deal. Borrelli thought the deal would avoid a charge against him. Gilbert intended to trap Borrelli into a more serious predicament through work on Roche, La-Barbera and McNally and thereby involve Borrelli more deeply, before Gilbert disclosed his desire to use Borrelli as a witness. Gilbert was too smart to lay his whole plan and scheme before Borrelli in the first interview. Borrelli would not have agreed to a plan which included him as a witness for the State at the beginning.

Your Honors will perceive the application of the above to the case at bar as the record is examined.

Captain Gilbert testified (Abst. 89):

"I knew from Bruce Borrelli's conduct and what he said and what he did there in Mr. Crowley's office that he was unwilling to implicate himself in a statement unless he had some sort of a promise. He wasn't going to give me anything unless he could get some sort of a promise. Then after he helped me to a certain extent he come to the point where he wouldn't do any more unless he knew where he was coming out. That is when I called Mr. Crowley. Then Mr. Crowley indicated to him that Mr. Crowley would not give him any promises. When Bud Borrelli learned that from Mr. Crowley he wouldn't go any further with any statement."

Here again your Honors will find that Kelly was a party to a controverted transaction. Borrelli claims that Gilbert told him not to make a statement to Crowley without a

promise. Gilbert denies this (Abst. 86). Judge Borrelli testified (Abst. 73):

“and finally Dan Gilbert said, ‘This is definite,’ he says, ‘wasn’t I good to you? Didn’t I send Tom Kelly to tell you not to talk to Crowley?’ ‘Well,’ I said, ‘just forget all about it.’”

Gilbert testified that he did not say this in Judge Borrelli’s office (Abst. 86). Is it not natural to conclude that the State would call Kelly if Gilbert is to be believed on this issue?

As was said in *People v. Holick*, 337 Ill. 333, 338, if the specific facts testified to by the defendant are true, the alleged confession was not made voluntarily. In the condition of this record they must be so regarded, since they were not met with any denial. On such issue the burden of proof is upon the prosecution (*People v. Frugoli*, 334 Ill. 324; *People v. Spranger*, 314 Ill. 602). In the *Holick* case our Supreme Court said that when it appeared that the State intended to furnish mere conclusions from only one police officer, who appeared to know the least about what had taken place (337), the trial court should have reversed its previous ruling admitting the alleged confession or set aside the ruling and required a thorough and complete investigation (339). In other words, the responsibility is upon the trial court, and the State’s Attorney should not be permitted to conduct the trial as if he were a plaintiff’s attorney.

Our Supreme Court answers this point by holding (R. 24):

“In determining as a preliminary question whether a confession by a defendant is admissible, the court is not required to be convinced, beyond a reasonable doubt, of its voluntary character.” (*People v. Bartz*, 342 Ill. 56.)

The law may be correct, but the statement of our Supreme

Court omits consideration of the entire absence of proof in the hands of the prosecution and a failure to apply the undisputed facts in accordance with the settled law.

It is held that where accused objects to a confession, the evidence should show all circumstances under which it was made, and that where the evidence tends to show the use of violence, threats, torture, or promises in obtaining the confession, all persons who had any authority or control over accused, or who participated in the confession, must be called as witnesses, if practicable, before the confession is admitted. (*People v. Arendarczyk*, 367 Ill. 534, 12 N. E. (2d) 2; *People v. Ickes*, 370 Ill. 486, 19 N. E. (2d) 373; *People v. Ardelean*, 368 Ill. 274, 13 N. E. (2d) 976; *People v. Cope*, 345 Ill. 278, 178 N. E. 95; *People v. Holick*, 337 Ill. 333, 169 N. E. 169; *People v. Rogers*, 303 Ill. 578, 136 N. E. 470.)

We can not expect your Honors to unravel and understand the relations existing between Captain Gilbert and Mr. Crowley, the chief prosecutor, but we can examine their conduct in the light of experience. We have a right to expect them to react to a situation in a normal manner unless there was something wrong about the whole picture. Everyone who took the stand who claimed any knowledge of the situation tells us that Borrelli refused to give Crowley a statement unless he (Borrelli) received a promise. The prosecutors do not explain why Borrelli should freely confess to Gilbert and then refuse to go ahead with Crowley if it is true that no inducements were offered by Gilbert, and if it is true, as Gilbert now claims, that he did not warn Borrelli against giving Crowley a statement. If Borrelli balked for no apparent reason, is it not reasonable to expect Gilbert would have said to Crowley, "I don't know why he refuses now. He has told me all about it and we don't need any further statement." The conclusion

we make from the absence of any such remark is that Gilbert was playing a game with the defendant as a pawn. He had outmaneuvered Borrelli into a position where he could use Borrelli, and he didn't want control of the situation to go out of his hands. Gilbert knew that Crowley would not make a direct promise before a court reporter, so Gilbert adopted this method of preventing a formal confession to Crowley. Gilbert didn't want Borrelli to confess to Crowley. If Crowley had secured such a confession without any promise, Crowley and not Gilbert would have been in control of the situation. The *habeas corpus* writ took the matter out of the hands of both Gilbert and Crowley. Then Captain Gilbert and Courtney proceeded to use the request of the grand jury and the appeal to Judge Borrelli as an elected official to help them in their desire to convict Keeshin. State's Attorney Courtney testified (Abst. 126):

"He (Judge Borrelli) blamed Keeshin for the whole thing and he said he would go down and in accordance with his promise to the grand jury and locate his son and talk to him and try to persuade him to tell the whole truth."

Further (Abst. 130):

"He (Bruce Borrelli) put himself into it and his father owed it to the law enforcement officials of Cook County to urge his son to tell the truth."

It is obvious from this record that Judge Borrelli was easily convinced, by Courtney, Crowley and Gilbert, at first that Keeshin was to blame, but naturally Judge Borrelli's attitude changed when he saw with his own eyes, and heard with his own ears, the manner in which the prosecutors were endeavoring to use his boy for the purpose of building a perjured case against Keeshin. It is fair to assume that at first Judge Borrelli believed that his boy had been

in a conspiracy with Keeshin and that it was his duty to compel the boy to assist the State. It appears now that Captain Gilbert is no respecter of persons and it matters not to him who might have been compelled to bend to the will of that powerful office while it was being used by Courtney for just such purpose.

It might be argued that because Borrelli kept asking the top men, Crowley and Courtney, for some assurance, that that shows that Borrelli had no promises. The record shows that he had every reason to fear Gilbert, and as he was on bail it is fair to assume that he was advised to protect himself against a division of authority in the office of the State's Attorney. This is demonstrated further by his testimony concerning Mr. Austin and Mr. Napoli, Assistant State's Attorneys at the time. Borrelli would have been decidedly ignorant if he did not catch on to the fact that there was a tendency to shift responsibility among the various officials, and that he was in danger of being caught in the middle of some sort of inner office strife. Also he could not help but observe the manner in which the prosecutors were attempting to use him. Their conduct and disregard of the rights of Keeshin and fair play did not commend the officials to Borrelli. And after his first experience in asking Napoli what was to become of him and observing the manner in which everybody evaded him, naturally Borrelli became alarmed.

The fact that the various officials were not in harmony is indicated by the following, which we quote from the cross-examination of Gilbert (Abst. 88):

"It is a fact that I let Moran go. I did not have Moran identified, I had him identified partially. I had a statement from Moran and his statement was he was not present at any time that any slugging took place down at Keeshin's.

"Mr. Stewart: Q. Well, Mr. Crowley told Mr. Bor-

relli before the grand jury that he had a statement implicating Moran, made by Moran himself, and that he had Moran identified? A. (By Captain Gilbert) Why, that was not told him, was it?"

So if Crowley had such a statement from Moran he evidently did not tell Gilbert (Abst. 118), and see questions and answers in record of grand jury testimony given by Borrelli (Rec. 352).

Courtney testified (Abst. 132):

"I don't know about the details, that these people had gone out of the back door of my place and down a fire escape. I am not acquainted with that detail when Lieutenant Kelly took Borrelli out of the office in the middle of the night."

It is probable that if the trip out of the window was made at the request of Borrelli and was not part of a deal, that Gilbert would have told Courtney about it. It appears now from the evidence that the first deal was made by Gilbert who had no intention of keeping faith with Borrelli. The first deal had served its purpose during the night when Gilbert tricked Borrelli into telling LaBarbera and Roche that he, Borrelli, had given information to Gilbert which involved LaBarbera and Roche in the beatings. So there was no need to bother the head man with the details of the police maneuver. Gilbert believed that he could carry on from there.

Concerning his trip to Judge Borrelli's office Captain Gilbert said (Abst. 87):

"My object in going down there was to see if I along with the State's Attorney could secure the appearance of Borrelli before the Grand Jury."

On cross-examination Gilbert said further (Abst. 88):

"There was a discussion about probation. I knew

that Bud Borrelli was unwilling to go as my witness before the grand jury unless he could find some way wherein it would benefit him."

Gilbert also said (Abst. 90):

"I knew when I went down to Judge Borrelli's office that Judge Borrelli was very much interested in the welfare of his boy. I knew he was very much interested in securing some benefit for him if he could, and he was relying on me to help him. Probation was discussed. It was discussed in the presence of Bruce Borrelli too, and the father of Bud Borrelli. It was after that discussion that Bruce Borrelli did come over here and go before the grand jury. I knew that it was the purpose of these gentlemen in the conduct of the prosecution, including me, to use Bruce Borrelli as a witness as against Keeshin after he appeared before the grand jury. That was our purpose right along. My purpose right along was that he would be a State witness. That was the whole purpose of taking Borrelli before the grand jury."

This series of admissions made by Captain Gilbert on cross-examination should have been sufficient to show the trial court that the confession was involuntary. Especially when these facts are not disputed by anyone connected with the prosecution and are amply corroborated by facts and circumstances in evidence.

So we trust that your Honors will perceive that our Supreme Court failed to give weight to the admissions made at the trial by the prosecution.

Here is what Judge Borrelli said occurred in the office of the State's Attorney (Abst. 72) after Judge Borrelli appeared before the grand jury:

"After I talked with Mr. Gilbert and Crowley, they wanted me to bring Bud before the grand jury. It was meeting the next morning, but I thought I would do it that afternoon, and when I left the room there I again asked Mr. Gilbert to come out and I said, 'Dan,'

I said, 'where will you be when I am at my office, I will probably want you at my office when my boy and I have this conversation,' and just as I was leaving he said, 'Judge,' he says, 'there will be probation for Bud.' 'Well, that is perfectly all right,' I said, 'I appreciate it, but I want you there when I talk to my son.' "

Judge Borrelli said that the conference in his office lasted about an hour while Gilbert and his son were there. Judge Borrelli testified (Abst. 74):

"But when I was there, the principal thing that was discussed was as to the way Bud was treated and the promises that were made to him, about somebody else taking the responsibility and having only a fine imposed, that he didn't wish to embarrass me. That is all that was discussed and I said, 'Forget all about that,' I said, 'now, that is over the dam.' "

On cross-examination Judge Borrelli said (Abst. 76):

"When I was here the first time to go to the grand jury I saw Captain Gilbert and he said, 'It is going to be probation for Bud.' When I left the office where Dan Gilbert was with Mr. Crowley and Mr. Courtney, I came out and then it occurred to me that I would like to know whether Gilbert could come to the office and where I could call him. So I called him out, the young lady called him out, he walked to the outside office and it was at that spot I told him where I could meet him and that is when he told me (about probation), without asking him, I didn't even ask him. He was called out of Crowley's office, and he had been in the main office, Mr. Courtney's office. They were in there talking, and he stepped out and told me, 'It is probation for Bud.' I supposed that they had agreed on that among themselves. I was relying on the promise he gave me. I was relying on that promise when I was advising my boy to go and cooperate with them and go before the grand jury. I expected in return for what I was advising my boy to do that they would keep their part of it on their side. That was the inducement I held out to my boy.

"I did tell my boy that Captain Gilbert told me he was going to get probation, and that is before Captain Gilbert came down to my office.

"Captain Gilbert says, 'You can rely on me,' or something like that. Captain Gilbert said, 'Don't you worry about this, you won't go to jail,' that is how he put it, the very last thing he said."

It must be significant that when Captain Gilbert was accused of double crossing in the office of Judge Borrelli by McAdams, Gilbert didn't deny the first deal and did not ask Bruce Borrelli to speak for himself about the deal. Naturally Judge Borrelli said that that was all over the dam and that he was not interested in a discussion of the first deal. Judge Borrelli did not feel himself in a position to scold Captain Gilbert and after all Captain Gilbert was in the conference at the invitation of Judge Borrelli. Judge Borrelli was interested in consummating a new deal. Gilbert at the conference entered a denial as to physical violence only, when everyone knows that he was not accused of beating Bruce Borrelli. Gilbert testified that he said (Abst. 84):

"I will ask the boy now in your presence, 'Was there ever a hand laid on you?' Bud said, 'No.' I said, 'How were you treated?' He says, 'I was treated all right.' I says, 'Did you have something to eat?' He says, 'Yes.' I asked, 'Did you have something to drink?' He said, 'Yes.' I said, 'Now, at any time while you were in the State's Attorney's office did anybody lay a hand on you or threaten you?' He said, 'No, they did not.' I said, 'Judge, are you satisfied as to that?' He said, 'I am.' He said, 'Dan, I don't think you touched my boy.' I says, 'He speaks for himself now.' He said, 'Now, I have been trying to talk the boy into going over to the grand jury over there and to tell the truth, and I have been before the grand jury myself, and I told the grand jury that I would prevail upon my boy to go over there and tell

the truth,' and I said, 'Well, that is the best thing for him.' 'Now,' I said, 'these other boys have all made statements, and Bud made a statement to me and he named all these people that were with them; I never knew the fellows around there (Note: Compare this with Gilbert's testimony, Abst. 78), and he told me the names of whoever was with them and what they did, he told me the part about Keeshin hiring him and that Keeshin had him on the payroll out at Sportsmen's Park, and he told me that he gave the other fellows \$10 or \$20, that most of them did it because of returning some favors he had done for them through his father.' I said, 'Now, Judge, the purpose I am down here for is to talk with me, requesting me to come down here. Now, I am down here, I don't know what I can do, only to tell you that if the boy goes out there and tells the truth to the grand jury there, that whatever any consideration will be shown, will have to be up to the State's Attorney and Mr. Crowley, because there is nothing I can promise the boy,' and the judge said, 'All right, Dan,' he said, 'I will, you go ahead and tell Mr. Courtney that we will be out to the grand jury in a short while,' and that is about all other than the fact that the Judge said to me, 'Well, now, I talked with Mr. Courtney,' he said, 'on this, and of course I got no promise and I have not got any promise from anybody.' I said, 'Well, that still goes as far as I am concerned, there is no promise with me.' Judge Borrelli said, 'Dan, if this boy goes all the way and testifies, you think there is a chance for probation for him?' I said, 'That is beyond me, that will rest strictly and solely with the State's Attorney.' I did not at any time promise Bruce Borrelli that he would get probation and that he wouldn't be indicted."

Your Honors will perceive that the defendant was suspicious of Gilbert because of his previous experience in the first deal. The trial judge seized upon this to indicate that the boy was unwilling to trust Gilbert, and therefore did not rely upon the promises made by Gilbert in the new deal. The trial judge concluded that the boy relied

upon his father and not Gilbert. But the trial court overlooked the fact that Judge Borrelli had told the boy that Gilbert had made the judge a definite promise. The boy believed his father and relied upon his father's assurance that Gilbert would keep his promise to the father. This is materially different than the conclusion of the trial judge. Our Supreme Court has overlooked these important details. Our Supreme Court concludes that Borrelli relied upon his father, the judge. We submit that that is only part of the truth, he relied upon his father who assured him that the prosecutors would keep their promises to the father for probation. The trial judge so found, but the trial judge held that a promise for probation did not make a confession involuntary because it could not be enforced. Judge Borrelli testified (Abst. 91):

“Right after Mr. Gilbert left my office I had a talk with my son. As I remember it, when Gilbert left, Bud asked me again, ‘You think he will keep his word?’ ‘Well,’ I says, ‘yes, he promised me, and he certainly would not disappoint me, we have been friends for so many years.’”

Frank I. Grossman (Abst. 135), a friend and office associate of Judge Borrelli's, a real estate investment broker, formerly president of the Grossman Shoe Company, operating twelve retail stores, testified (Abst. 136):

“The Judge was talking to his son Buddy, and told him that, ‘I have a definite promise and I want you to go before the grand jury,’ and Buddy says, ‘I couldn't do that, dad.’

“He says, ‘Well,’ he says, ‘now, if you don't believe me, I will have Dan Gilbert here to tell it to you.’

“So when Gilbert came in a little while later and Frank McAdams was there and Dan started to talk, to go over the case with the Judge; he put his chair in front of the desk and was just sitting there and we wanted to relate the case there, and then Frank

McAdams butted in and started, 'What about the deal you did have?' He says, well, Dan says, 'Well,' he says, 'if that is going to be the case, I might as well go,' and started to get up and the Judge told Frank McAdams to keep quiet and leave Dan tell his story. Captain Gilbert related the case, and he started out stating to Buddy, saying to Buddy, 'Weren't you treated O. K. down there?' 'All right.' Buddy says, 'Yes.' He said, 'Nobody laid a hand on you?' 'Yes.' He said, 'Didn't I tell Officer Kelly to tell you not to say anything to Crowley?' 'Yes.' He says, 'There you are, I am trying to return, to do something for Buddy if I can, if it is in my power, I want to do something for Buddy, and I want to do something for you, Judge.' And then he related the case."

Here we have as a witness, a businessman. The truth will come out, it appears. What story was there for Gilbert to tell unless he was there as a super salesman selling Judge Borrelli and Bud Borrelli the idea that it was best for them to go along with Gilbert's plan and scheme to prosecute Keeshin? Why convince everyone he came as a friend if he was not offering to be a friend and was not holding out inducements?

The trial judge in the case at bar said in his opinion (Abst. 139):

"Defendant contends that after the original betrayal, when he did not gain his release after inducing Roche and LaBarbera to assume responsibility for the sluggings, he declined to rely further on Captain Gilbert's promises. He claims further that it was his father, Francis Borrelli, a Judge of the Municipal Court of Chicago for many years, who later prevailed upon him to testify before the grand jury upon an alleged promise by Captain Gilbert to the Judge that he, the defendant, would be given probation."

We submit that the trial judge misconceived the contention of the defendant and overlooked the circumstances

developed by both sides showing that Bruce Borrelli was influenced by Captain Gilbert's promises after they were approved and repeated by his father.

The error of the trial court is shown by the written opinion, from which we quote (Abst. 140):

"Like every devoted father, Judge Borrelli tried to win every consideration for his son, and like an honorable judge, he admonished his son to tell the truth. But he must have known that probation is solely within the sound discretion of the presiding judge after a trial and conviction, and that no one, not even the State's Attorney, has a right to bargain for or impose upon that honest judgment. The Court strongly resents and vehemently rejects any such inference or understanding."

If the trial judge meant that he felt a personal resentment the trial judge overlooked the fact that when these promises were made Borrelli had not been indicted and therefore the case had not been assigned and no particular trial judge entered the minds of the parties.

So we gather from the opinion of the trial court that the court accepted the testimony of Judge Borrelli as true, that Gilbert gave the judge a definite promise. But the trial judge erroneously concluded that such a promise communicated to the son and relied upon by the son had no effect upon the admissibility of the confession, as a matter of law. In this, we submit, the trial court was obviously in error.

The correct rule concerning the apparent authoritative influence as ground for exclusion overlooked by the trial judge is expressed by Wharton as follows (Wharton's Criminal Evidence, Tenth Ed., Vol. II, p. 1383, sec. 673):

"If the influence applied was such as to make the defendant believe that his condition would be bettered - by making a confession, true or false, or that he would

be made to suffer if he did not confess, the confession is to be excluded; but if not, the confession is admissible."

The law concerning the use of tricks, falsehoods and deceit by policemen in obtaining confessions.

The law seems to be settled that tricks, falsehoods and deception employed by police and prosecutors do not make a confession inadmissible unless it further appear that the trick employed or the falsehoods or deception were calculated to bring about a false confession. The rule is stated, and a number of authorities are collected, by Dean Wigmore (Vol. III, Wigmore on Evidence, Third Edition, sec. 841, p. 281). Cases where the confessions have been admitted are illustrated wherein the police falsely told a defendant that his accomplice had confessed, where the police made false statements as to evidence in their possession, where false promises of secrecy were made, where a confession was made in confidence, where a letter had been obtained by deception, where a detective falsely pretended to help the defendant, or pretended to arrange for his escape, and where a detective impersonated another criminal and was put in with the defendant as his cell mate.

So applying the principle of these cases and the rule to the case at bar, if Gilbert had testified that he suspected Borrelli but didn't know his accomplices, and falsely pretended to Borrelli that he would allow the accomplices to settle for \$100 fines if Borrelli produced them, and then if Borrelli delivered his accomplices in Gilbert's hands and Gilbert did not keep his word, there is nothing that Borrelli and the accomplices could do about it. If they made confessions because of this deceit and further false representations from Gilbert that he was in possession of evidence of guilt and knew all about their movements, such

confessions might possibly be used in evidence. But if Gilbert added a further inducement that Borrelli could go home after he produced confederates, such an inducement might lead to a false confession and would be cause for rejection.

A case which is a great deal like the case at bar in principle is that of *State v. Green*, 273 P. 381, 128 Or. 49.

It appears that while Green, the defendant, was in jail charged with murder one Barada, a detective, was placed in his cell under the guise of a bank robber who had made a rich haul and in getting his man. The prisoner and the detective became friendly, but the prisoner would say nothing further than he killed in self-defense. The detective got the sheriff to take him to the office of the jail, where the detective met the prosecutor and told of his plan to obtain a confession. Barada got \$1,500 in cash from the prosecutor, showed it to the defendant and said he was going to buy his way out. That all he had to do was come clean, lay his cards down to the prosecutor, confess and then pay and be released. Barada promised the defendant nothing, but told him he would lend him the money to use as a bribe if he could make such a deal with the prosecutor. The detective was released from jail pretending to have worked his scheme and to have bought his liberty. Then the defendant sent word to the District Attorney and a meeting was arranged. The defendant said to the prosecutor he was guilty and offered \$2,000. The District Attorney spurned the bribe and admonished the defendant that if he wanted to make any confession it would have to be free and voluntary. Green then made and signed a seven-page statement telling how he killed deceased, claiming self-defense. The District Attorney, in his opening statement, told the jury that after the statement was in evidence he proposed to prove the falsity of

the self-defense claim. The trial court admitted the confession, and in the Supreme Court it was claimed that Barada was not a person in authority. The court in reversing the conviction said:

“We deduce then that, after all, the important thing to be determined is the effect the inducement had upon the accused person’s mind. The only fair test, if such it may be called, which can be applied in this: was the inducement held out to the accused such as is there any fair risk of a false confession? For the object of the rule is not to exclude a confession of the truth, but to avoid a possibility of a confession of guilt from one who is in fact innocent. *State v. Sherman*, 35 Mont. 512, 90 P. 981, 119 Am. St. Rep. 869; *State v. Dixon*, 80 Mont. 181, 260 P. 138; *Whip v. State*, 143 Miss. 757, 109 So. 697; *Spears v. State*, 2 Ohio St. 583. In Wigmore on Evidence (2nd Ed.), Sec. 831, it is said that the only rational and correct test for determining what kind of inducement suffices to exclude a confession is: ‘was the inducement of a nature calculated under the circumstances to induce a confession irrespective of its truth or falsity?’ ”

Which case is cited with approval in *Ziang Sung Wan v. United States*, 266 U. S. 1:

“The human mind under the pressure of calamity, is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail.”

The court said further in the *Green* case (385):

“In the instant case Barada was not believed by defendant to be a person in authority, but, with the connivance and cooperation of the district attorney, Barada was enabled to dominate the mind of Green. The district attorney, through his agent Barada, firmly impressed upon the mind of this defendant that he could get out of jail by making a confession and paying \$2,000. If the district attorney himself had promised the defendant his liberty if he would do as above

stated there could be no doubt that a confession thus obtained would be rejected. Shall we place the stamp of approval upon his accomplishment by indirection that which he would not be permitted to do directly. It is to be borne in mind that the district attorney concedes that he knew the use which Barada was to make of the roll of bills which he furnished him. It is said in Wharton's Criminal Evidence (10th Ed.), sec. 671: 'Whenever a promise or threat is held out in such a way as to reach the defendant, although not made to the defendant directly, it will exclude the confession.' "

In the case at bar Borrelli was not told that he could bribe Messrs. Courtney and Crowley with money. If Gilbert had told Borrelli that he could confess and pay money and thereby secure his liberty chances are Borrelli may not have believed Gilbert. But it is obvious that Borrelli did believe Gilbert when Gilbert said that all Borrelli had to do was to involve Keeshin and nothing would happen to Borrelli.

Gilbert knew when Borrelli hesitated and refused that Gilbert had to sell him the idea that the State's Attorney's office had the power to, and would, put him on the street, no matter how black Borrelli had to make his own conduct appear in order to involve Keeshin. That is why Gilbert reminded Borrelli that his office had put Murphy, a murderer, on the street in the *Daiches* case. We suggest that your Honors examine *People v. Weitzman*, 362 Ill. 11. In the *Weitzman* case, as here in the case at bar, the prosecutor endeavored to convict the person suspected by the State's Attorney as the one higher-up, with no other evidence than that which came from a tainted source. It is common knowledge that Murphy was permitted to walk out a free man after confessing to a brutal, cold-blooded assassination, merely because he tried without success to blame his crime on Weitzman.

From the opinion in the *Weitzman* case your Honors will note that Murphy was arrested and released, but when the prosecutor was able to charge him with robbery with a gun he was again arrested. This charge no doubt was used as a lever. The indictment for the murder of Daiches soon followed (p. 14). Your Honors will notice that Murphy testified upon cross-examination that consideration would be asked in his behalf if he told the truth (p. 18). In view of the fact that Murphy was subsequently released, after having been kept in a hotel, it is fair to assume that he too had a deal which included immunity from the robbery charge. As was said in *People v. Temple*, 295 Ill. 463, 469:

“What followed is convincing of the existence of a previous understanding or an expectation of leniency, which was realized.”

Borrelli was a court bailiff, and it is fair to assume that he had every reason to believe Gilbert when Gilbert cited this case which is of more or less common knowledge. Your Honors will note that the capias for Murphy had not been served, he had not been required to plead and had not been confined in jail (p. 17). The trial judge in the case at bar did not seem to be familiar with the power exerted by the prosecutors when he questioned their ability to deliver on their promises to Borrelli.

Your Honors will notice the absence of Kelly and other officers shown to have been involved. Your Honors will notice that Mr. Napoli and Mr. Austin failed to take the stand to deny serious charges against them. Your Honors will notice the failure on the part of the State to produce various statements, transcripts and records. As your Honors know, it is a fundamental canon of proof that where weaker and less satisfactory evidence is offered when stronger and more satisfactory evidence is within the

power of the party, the evidence offered should be viewed with distrust (32 C. J. S. Evidence, sec. 1035, p. 1079).

The question is not whether the persons making the promises were persons in authority, that is, capable of performing their promises, but were they in such a situation that the person confessing might reasonably consider them as able to do so. (*State v. Foster*, 183 P. 397, 25 N. M. 361, 7 A. L. R. 417; *Clark v. State*, 45 S. W. (2d) 575, 119 Tex. Cr. 50; *Hanus v. State*, 286 S. W. 218, 104 Tex. Cr. 543.)

The trial judge laid stress upon the fact that Borrelli had been relieved of his illegal restraint and was on bail in his father's office with the benefit of his father's advice in holding that his confession was voluntary. As was said by Mr. Justice Holmes in his dissent to *Hyde v. United States*, 225 U. S. 347, 391:

"It is one of the misfortunes of the law that ideas became encysted in phrases and thereafter for a long time cease to provoke further analysis."

It may be claimed here that Borrelli was free to choose between standing upon his constitutional right of silence or going before the grand jury. But as is said in Wigmore on Evidence, Vol. III, 3rd Ed., sec. 841, p. 251:

"All conscious verbal utterances are and must be voluntary; and that which may impel us to distrust one is not the circumstance that it is involuntary, but the circumstance that the choice of false confession is a natural one under the conditions. The choice of false confession is voluntary, but the false confession is associated with a prospect (namely, of escape from present harm) so tempting that it is not in human nature to resist it."

It must be remembered that Borrelli had been identified by Mitchell, Milich, Wassell and Gottlieb. He was certain that the State's Attorney could convict him of some crime without his confession, and whether Keeshin was involved

or not. Mr. Crowley had told Borrelli that he was going to send him to the penitentiary for mayhem. So Borrelli was not in the position of an innocent person, requested to calmly and freely choose between staying away with his father or accompanying Gilbert to the grand jury. As is said by Dean Wigmore (sec. 841):

“As between the rack and a false confession, the later would usually be considered the less disagreeable, but it is none the less voluntarily chosen.”

In the case at bar your honors will note that the stooges, Roche, LaBarbera and McNalley were released upon payment of \$100 fine, no costs (Abst. 17).

The confession we are considering is the confession to the crime of conspiracy, not the confession that certain assaults were committed. The conspiracy part is false, according to Borrelli, according to Keeshin and in accord with the finding of the court. So Borrelli was confronted with either facing a certain penitentiary sentence, as it was made to appear to him, or furnishing a false confession as an easy way out, which would please the authorities and at the same time relieve his father of an embarrassing situation. As is further said by Dean Wigmore (Wigmore on Evidence, Vol. III, 3rd Ed., sec. 841, p. 251):

“Thus where a promise (for example of pardon) is the inducement for a confession, its effect is to make the certain freedom which will accompany a false confession more attractive at the moment than the mere possibilities of freedom, coupled with temporary restraint, which attended silence.”

In the case at bar Borrelli was able to demonstrate the actual falsity of his confession which is more than the law requires for rejection. As was said by Dean Wigmore (Wigmore on Evidence, 3rd Ed., sec. 856):

“A very slight probability of untruth, to be sure,

is sufficient to exclude (a probability much less than that which supports other testimonial exclusions) and the tests worked out are often more or less artificial; but this principal underlies the whole body of rules."

The Law Relative to Confessions.

It is a well established general rule, that a confession of guilt by accused is admissible against him when, and only when, it was freely and voluntarily made without having been induced by the expectation of any promised benefit, or by the fear of any threatened injury, or by the exertion of any improper influence. (*People v. Ardelean*, 368 Ill. 274; *People v. Campbell*, 359 Ill. 286; *People v. Basile*, 356 Ill. 171; *People v. Cope*, 345 Ill. 278; *People v. Fudge*, 342 Ill. 574; *People v. Bartz*, 342 Ill. 56; *People v. Holick*, 337 Ill. 333; *People v. Shroyer*, 336 Ill. 324; *People v. Reed*, 333 Ill. 397; *People v. Ziderowski*, 325 Ill. 232; *People v. Fox*, 319 Ill. 606; *People v. Kircher*, 309 Ill. 500; *People v. Klyczek*, 307 Ill. 150; *People v. Sweeney*, 304 Ill. 502; *People v. Heide*, 302 Ill. 624; *People v. Vinci*, 295 Ill. 419; *People v. Campbell*, 282 Ill. 614; *People v. Goldblatt*, 383 Ill. 176.

An exhaustive note on confessions will be found in 18 L. R. A. (N. S.) 768, including the effect of promises (p. 820) and repudiation of agreement to turn state's evidence (p. 823).

The practice of taking into custody and detaining persons merely suspected of crime, for the purpose of extorting confessions from them, is condemned by the courts; and in determining whether or not a confession was made voluntarily, it is proper to take such illegal practice into consideration, or of illegal custody. (*People v. Vinci*, 295 Ill. 419; *People v. Klyczek*, 307 Ill. 150.)

Whether a confession is voluntary or, in other words,

testimonially worthy depends largely upon the facts of the particular case, and his surroundings, as well as the nature, content and import of the confession itself. (*People v. Campbell*, 282 Ill. 614; *People v. Klyczek*, 307 Ill. 150; *State v. Johnson*, 83 P. (2d) 1010, 95 Utah 572.)

Involuntary confessions are rejected, not because of the illegal or deceitful methods which may have been employed in securing them, but because they are testimonially unreliable and untrustworthy. (*People v. Fox*, 319 Ill. 606; *People v. Barber*, 342 Ill. 185; *Gates v. People*, 14 Ill. 433, and see note 18 L. R. A. (N. S.) 840.)

It is well settled that a confession will not be excluded because of a mere exhortation or adjuration to speak the truth. On the question whether an exhortation accompanied by an expression that it would be better for accused to speak the truth is sufficient alone to exclude a confession, the authorities are divided, some holding that it is, and others that it is not. The real question is whether the language used in regard to speaking the truth, when taken in connection with the attending circumstances and with other language spoken in the same or in some prior interview, shows that the confession was under the influence of some threat or promise, the confession being inadmissible where it was made under such influence. (*People v. Klyczek*, 307 Ill. 150; *People v. Heide*, 302 Ill. 624; *People v. Vinci*, 295 Ill. 419.)

When the prosecutors and police keep at a defendant to tell the truth there often can be no question as to what is meant by telling the truth. It could mean only that nothing but a confession of guilt would be accepted as the truth (*Brown v. State*, 132 S. W. (2d) 15).

Confessions made by accused under the promise or encouragement of any hope, benefit, or favor made or held

out to him by officers or other persons in authority, or by a private person in their presence, are not voluntary, and therefore are inadmissible. (*People v. Campbell*, 359 Ill. 286; *People v. Holick*, 337 Ill. 333; *People v. Stokes*, 334 Ill. 200; *People v. Swift*, 319 Ill. 359.)

A confession is inadmissible if induced by a promise, express or implied, that if accused would confess efforts would be made to mitigate his punishment; by a promise of immunity from prosecution or punishment, by the promise of the prosecuting officer to discontinue the prosecution. (*People v. Martorano*, 359 Ill. 258; *People v. Knox*, 302 Ill. 471; *People v. Andrae*, 305 Ill. 530; *People v. Buckminster*, 274 Ill. 435.)

Confessions made to persons in authority, the prosecuting officer and his assistants or agents are presumed to have been produced by any promises they may have made to induce the confessions. (*Lucas v. State*, 221 P. 798, 26 Okl. Cr. 23; *Mays v. State*, 197 P. 1064, 19 Okl. Cr. 102; *State v. Green*, 273 P. 381, 128 Or. 49; *State v. Lord*, 84 P. (2d) 80, 42 N. M. 638; *Rowan v. State*, 49 P. (2d) 791, 5 Okl. Cr. 345.)

An inducement to a confession held out by a private person in the presence of one in authority, and not expressly contradicted or rejected by such person, will exclude a confession based upon it, since it is the same in legal effect as if the inducement were held out by the one in authority. (*Rowan v. State*, 49 P. (2d) 791, 5 Okl. Cr. 345; *Hanus v. State*, 286 S. W. 218, 104 Tex. Cr. 543; *People v. Reilly*, 169 N. Y. S. 119, 181 App. Div. 522, 36 N. Y. Cr. 248, affirmed 120 N. E. 113, 224 N. Y. 90.)

It was held in *People v. Campbell*, 359 Ill. 286, that a confession obtained by promise or hope of reward is not admissible in evidence, and if a confession is secured by

hope of leniency the law presumes that it was induced by such promises, as in such case the law cannot measure the force of the influence used nor decide upon the effect such promises may have had on the mind of the prisoner.

In *State v. Faulkner* (1903), 175 Mo. 611, 75 S. W. 116, it was said:

"It is intolerable that one whose conduct is being investigated for the purpose of fixing on him a criminal charge should, in view of our constitutional mandate, be summoned to testify against himself and furnish evidence upon which he may be indicted. It is a plain violation both of the letter and spirit of our organic law."

Where a person in custody under a charge of crime is taken before the grand jury, and, unattended by counsel, and possibly uninformed as to his rights, is interrogated in regard to the matter in connection with which he is charged with crime, an indictment based wholly or in part upon his testimony should be quashed. (*Boone v. People*, 148 Ill. 440.)

If a confession before a grand jury was given involuntarily or under the influence of hope or fear, it is not admissible on the trial. (*United States v. Charles* (1813), 2 Cranch C. C. 76, Fed. Cas. No. 14,786; *Cooper v. State* (1906), 89 Miss. 429, 42 So. 601.)

In *People v. Buckminster*, 274 Ill. 435, it appeared that one Fink, having been promised immunity for his part therein by the assistant state's attorney, confessed that he had been hired by the defendant to burn a certain building. The court held the confession inadmissible.

It was there held that prosecuting attorneys, their agents, and authorized investigators are generally held to be "persons in authority," so that the confessions induced

by a promise of immunity held out by them are inadmissible in evidence.

Where an agent is sent by the prosecuting attorney to a person accused of crime for the purpose of obtaining admissions, and tells the person that he is authorized by the prosecuting attorney to find out who the parties were that were concerned with him, and that it would be better for his interest and save him a heavy fine if he would own up who the parties were, it was held that a confession thus obtained was inadmissible in evidence. (*Searles v. State* (1892), 6 Ohio C. C. 331, 3 Ohio C. D. 478.)

So, where it appeared that the prisoner was charged with arson, and the county attorney, city marshal, and another party went to the prisoner's house to see him with reference to turning state's evidence, and the county attorney told him that if he would testify for the state through all the courts, he would see that he would not be prosecuted, but warned him that his testimony might be used against him if he refused so to testify, and the prisoner thereupon gave evidence on the examining trial, but refused to testify when called against his accomplice, it was held that the confessions of the defendant, made at the examining trial, were inadmissible against him on his own trial, because not made in compliance with the statute that no confession is admissible in evidence "unless freely made without compulsion or persuasion." (*Lauderdale v. State* (1892), 31 Tex. Crim. Rep. 46, 37 Am. St. Rep. 788, 19 S. W. 679.)

Your Honors will recognize these fundamental principles, and we submit that when applied to the case at bar it follows that the judgments should be reversed.

Federal Question in the Matter of Confession.

The constitution and laws of the State of Illinois require due process of law. One reason we went direct to our Supreme Court is that we claim the protection of the constitution. (*People v. Martin*, 382 Ill. 192.)

This Honorable Court has held in a number of cases that where a State court makes use of an involuntary confession and bases a conviction thereon, due process is not only denied, but the court loses jurisdiction.

It was held in *Brown v. Mississippi*, 297 U. S. 278, that a conviction based upon an involuntary confession was void under the due process clause of the fourteenth amendment. The court said (285):

"The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts*, *supra*; *Rogers v. Peck*, 199 U. S. 425, 434. The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. *Walker v. Sauvinet*, 92 U. S. 90; *Hurtado v. California*, 110 U. S. 516; *Snyder v. Massachusetts*, *supra*. But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. *Moore v. Dempsey*, 261 U. S. 86, 91. The State may not deny to the accused the aid of counsel. *Powell v. Alabama*, 287 U. S. 45. Nor may a State, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is 'but used as a

means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' *Mooney v. Holohan*, 294 U. S. 103, 112. And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' *Herbert v. Louisiana*, 272 U. S. 312, 316. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."

To the same effect is *Chambers v. Florida*, 309 U. S. 227, and *White v. Texas*, 309 U. S. 631, rehearing denied 310 U. S. 530.

About Moran.

A person cannot conspire by himself. We contend that the only proof of a conspiracy is to be found in the confession. This part of the confession as to Keeshin was shown to be false. At first our Supreme Court agreed as to the labor case that we were correct in our contention that no *corpus delicti* had been proven outside of the confession. We quote from the first opinion (R. 16):

"The essence of the crime charged in case 42-125 is a conspiracy to injure the persons of certain named employees of Keeshin Motor Express Company. We have carefully examined the record and do not find any evidence, aside from his confession, tending to prove that plaintiff in error ever conspired with anyone to injure the persons of these employees. Neither are we able to find in the record any evidence whatever corroborating his confession as to the existence

of such conspiracy or from which any inference can be drawn in corroboration thereof. If plaintiff in error had been convicted of the crimes of assault and battery committed upon the persons of these employees, and were we asked to review these convictions, a different question would be presented; but in this case we do not find any evidence with reference to the existence of a conspiracy sufficient to justify the judgment of the court."

Upon rehearing our Supreme Court reversed itself and found evidence of conspiracy. This final judgment, we contend, is not supported by the proof and in order to demonstrate our point, it is necessary for us to examine the record further.

Our Supreme Court has put Moran back into the case after the prosecution let Moran go home without an indictment. This furnishes a co-conspirator but it is contrary to the facts. The prosecution endeavored to change its theory after Moran had been released by them.

There is something strange about the manner in which the prosecution handled the case against Raymond Moran. Although Borrelli told the grand jury that Moran was with him at the time (Abst. 146) and Mitchell said that Moran struck him (Abst. 20), and Moran so admitted before the grand jury (Abst. 5, 117), Moran was not indicted and was released after Borrelli testified before the grand jury.

Either Moran was guilty and was released in order that he not contradict Mitchell as to the manner in which he was slugged by two men in an automobile, and in order that he not contradict Borrelli who said that Moran was there but that the slugging was not administered by two people in an automobile, or Moran was not guilty and the confession of Borrelli was false as to the place and manner in which Mitchell was struck by Borrelli.

Or Moran was released, guilty or not guilty, because he knew too much about the first deal and would have told it in defense of himself, and the prosecutors desired to get rid of him because he would have injured the case which was being prepared against Keeshin. Moran was released just after Borrelli appeared before the grand jury and while the prosecutors were in the belief that Borrelli would testify against Keeshin.

How often do you find that the State's Attorney weighs the evidence and releases a man in Moran's position without any charge? There must be a reason. The simplest reason, which appears clearly from this record, is that the State intended to convict Keeshin with Borrelli's testimony and the prosecutors were anxious to avoid contradictions. Subsequent conduct upon the part of the prosecutors demonstrates that they intended to compel Borrelli to agree with the version given by Mitchell. The case against Moran was of no importance to them. Nor was the case against anyone but Keeshin.

Here is the explanation given by the first assistant State's Attorney (Abst. 117):

"Mr. Stewart: Q. Now, Mr. Crowley, I am going to call your attention to the transcript which is here as an exhibit, and on page 30, I will read the questions and answers and ask you whether or not that is your recollection of what happened when Bruce Borrelli was being examined by you as a witness (reading):

"Mr. Crowley: Q. That is the time Mitchell was beat up at two o'clock in the afternoon? (Borrelli): A. No."

"Q. Who was with you when Mitchell was beat up? (Borrelli): A. Moran."

"The Witness: I remember those questions and answers being made.

"At the request of counsel for the defendant Mr.

Crowley read from the transcript of Borrelli's grand jury testimony concerning Moran.

"The Witness: I was telling Borrelli about what Moran testified to, before the grand jury. I as a lawyer knew that that would put Moran in a conspiracy if Moran told me that before the grand jury. Provided Moran had been in the conspiracy. I said provided that Moran had an intent to join the conspiracy. Moran says he didn't. We have no case predicated upon this incident. I would like to answer your argument and your claim that we had a case against Moran, and also your claim that it was part of the deal with Gilbert. Moran was released by me and I assumed the responsibility for releasing Moran for this reason, that Moran went with Borrelli over to the Pioneer Trucking Company, Moran said Borrelli was going over there to apparently intimidate somebody, or Borrelli told him he was going to do that, and Borrelli didn't do anything over there. Moran said he was not going over to hit anybody."

Your Honors know, and Mr. Crowley knows, that under the law of conspiracy it was not necessary to prove that anyone was actually hit. If Moran did what Crowley said that Moran said he did, Moran was guilty of conspiracy and Mr. Crowley knew it.

"(The Witness, continuing): Moran said, 'I was at the Keeshin place one other time, but at the time I was there I didn't see anybody hit and didn't go there for the purpose of hitting anybody.'

"Borrelli said (before the grand jury), 'Moran was with me over to the Pioneer Trucking Company when I went over there to call that fellow Even to stay away and Moran was with me at another time when I slugged Mitchell.' I think before the grand jury he (Borrelli) said that Moran saw the incident. Moran said, 'No, I never saw the incident.' And when we got down from the grand jury room that is why I held the conference between Borrelli and Moran because Moran was an ex-convict and ex-prize fighter and looked for all the world like a fellow that would slug you all

over the place and if he is ever held to court on the indictment, the fellow wouldn't have much of a chance and I wanted to be sure he was in the conspiracy in connection with the matter because I believed that going along with Borrelli he must be because he had been partially identified. The witness (Mitchell) wouldn't say positively it was him, and there were two other fellows, LaBarbera and Roche, that were along with Borrelli, I did not know it might be them. And Borrelli said, 'You were with me at the time, I don't know if you saw me hit the fellow or not, that is the time I can't be sure of I answered before the grand jury that he did see me, but I can't be sure that he saw me hit the fellow,' and this fellow Moran was still crying and Moran said, 'Bud, say so, you know I never saw you hit anybody, why do you say that?' Bud said, 'Well, if you didn't see it, well, then you didn't see it, I can't say you did.'

"Then I said to Borrelli, 'Well, if Moran was not the fellow that was there, Mitchell says two fellows put the clout to him, somebody else, who was it?'

"Borrelli says, 'Gee, I thought it was Moran, but if he says he wasn't there, I will take his word for it, he wasn't there,' or words to that effect. 'I am not going to say he was there, I can't be positive.'

"That is the reason Moran isn't tied up and indicted into the conspiracy in this case and that is the reason there is no charge predicated in connection with the visit by Borrelli to Even's plant at the Pioneer Trucking Company where they went over to intimidate Even, that we have not made any charges on that.

"Mr. Stewart: Q. Now, did you make a recommendation to the grand jury along the line you have just told us now that Moran be not indicted?

"A. No, I don't know as I made any recommendation to the grand jury along that line.

"The Witness: He (Borrelli) gave him (Moran) ten dollars for going over to the Pioneer Company with him. Those questions were asked. I do not have a statement taken from Moran. There may be one in the office, I don't know, I didn't take one. I will look and see if I have one and bring it back here at two o'clock."

This statement was never produced or accounted for by the prosecution, and it is fair to assume that if it were produced it would contradict the explanations given upon behalf of the People in excuse of the release of Moran. The statement no doubt would help show further that the agents for the State were manufacturing evidence to suit their purpose of convicting Keeshin. That they rejected the truth and clung to the false wherever it suited their main objective against Keeshin.

During the cross-examination of Mr. Crowley we find this (Abst. 120):

“Mr. Stewart: Q. And the same with reference to the original statement that was taken from these three men that testified?

“Mr. Napoli: We object, Judge, I can’t understand what Mr. Stewart is doing, whether or not he is here asking those questions or he is conducting an investigation, and we object to it.

“The Court: Unless Mr. Stewart connects it up, the objection will be sustained.”

Neither were these statements ever produced. Of course, your Honors know that we had a perfect right to conduct an investigation, and if the prosecution had been properly conducted the State would have welcomed an investigation. We submit that it was the duty of the court to investigate fully before allowing the confession in evidence (*People v. Rogers*, 303 Ill. 578).

The importance of the original statements made by Mitchell in this connection is that he claimed at this trial that he only partially identified Moran (Abst. 30). At a previous hearing in the civil matter Mitchell said that he identified Moran (Abst. 22, 23, 163). If the statement made to the prosecutor by Mitchell before Moran was released shows a positive identification of Moran, Mr. Crowley must be mistaken in his present explanation.

Your Honors know that the State didn't need an identification of Moran under the circumstances. It is significant that Mitchell changed his testimony after the State had released Moran. The State had no identification of LaBarbera and Roche by Mitchell, Milich or Wassell as far as this record discloses. Yet they secured an indictment against them. Your Honors know that any grand jury would have indicted Moran, unless requested not to by someone in authority.

We contend that the reason that the prosecutors didn't have Moran indicted was that they had a deal. They were capable of repudiating their deal and could have denied having any deal. But Mitchell's story contradicts Borrelli on the facts and the State was planning to use Borrelli's story, true or false, insofar as it involved Keeshin. At the time they released Moran they believed that Borrelli was to be a State witness. They didn't want Borrelli to be continually claiming that his deal called for a release of Moran. They had no charge against Mitchell, and evidently they did not think they could make him change his story to leave out the automobile and Moran. Your Honors know that the grand jury did not just happen to omit Moran from the indictment, and your Honors know that the indictment was prepared by the prosecutors.

Here is the testimony of Borrelli upon the subject (Abst. 52):

"After I went before the Grand Jury and finished there I was taken down to Captain Gilbert's office. I saw Captain Gilbert and Mr. Crowley there. Mr. Crowley said, 'Well, you did fine up there.' I said 'What are you going to do with me?' He said, 'You are not going to go to jail, don't worry about a thing.' And I said, 'What about Moran?' I said, 'You still got Moran locked up?' Moran was brought in then. That is why I mentioned Moran, he was brought in by a policeman. He sat down and they said, 'Well,

Moran will be all right, we will turn him loose in the morning.' And I says, 'What have you been holding him for?' I told him Moran had not done anything, and Captain Gilbert started to question Moran. Moran started to cry. Gilbert said, 'I know he didn't do anything, turn him loose in the morning.' That was all there was to it and I went home. They released Moran the next day and I was there when he was released."

Borrelli said on cross-examination, which was not disputed by any of the prosecutors (Abst. 201):

"I don't know what I meant by the answer to the question (before grand jury), 'Did Moran see Mitchell beat up? Answer: Yes.' I can't recall what I meant, but I had numerous discussions with you (Mr. Austin) and Mr. Napoli and Mr. Crowley and each claimed Moran was there. I, well, claimed Moran was not there."

On re-direct examination Bruce Borrelli said (Abst. 206):

"Mr. Austin started to ask me about each incident in detail and asked me about Mitchell's case and I said I was alone. And Austin said, 'Oh, no, you were not, you must have been with Moran, you were with Moran,' I said, 'Now, listen, I am not trying to lie to you, I am trying to tell you the truth.' I said, 'There was not anybody with me, and if you don't want to believe me I can't help you,' and we at the time had an argument about it and Mr. Kelly, he heard the argument in there, and Austin took the attitude I was lying and said, 'Don't give me that stuff.' I says, 'What do you want me to do, to make something up, put him in there when he wasn't there?' He wasn't there. Austin finally got pretty disgusted and he said, 'Oh, I am disgusted with him.' He walked out. Two or three days later I was asked to be down in the State's Attorney's office. When I went there I saw Mr. Napoli and he said, 'Mr. Crowley and Mr. Courtney want to see you.' I went in the office and the same thing was brought up. Mr. Courtney, Mr. Crowley and Mr. Napoli were there,

and Mr. Austin was not there. Napoli said, 'He is trying to inject a self-defense in here, and there is a telephone conversation here that he wants to deny,' and Mr. Crowley said, 'Now, Borrelli, you are a state witness, and so is Mitchell.' He said, 'There is a fatal variance in your story. I don't understand how that can happen and if you say Moran wasn't there and he (Mitchell) said Moran was there, we have no case.' "

Further (Abst. 209):

"Both of these gentlemen (Crowley and Napoli) said, 'Now, listen, Borrelli, you are a witness now, that is not the way to act.' I said, 'I can't act any differently than this because I am going to tell you the truth and Moran was not there, you are not going to get me to say he was there when he was not there.' * * * Mr. Crowley said, 'There could have been somebody around.' I said, 'If someone is back up the road and somebody I don't know of course a half a block away, how do I know what they are doing?' And he said, 'You could say there was somebody around.' I says, well, I don't like it, I insisted Moran wasn't there and they said, 'No, no, no.' "

Further on re-cross examination by Mr. Austin, Bruce Borrelli said (Abst. 211):

"I was not going to say Moran was there, because Moran wasn't with me. * * * We went over the grand jury statement. The first time we had any controversy, you (Mr. Austin) and I and Napoli, that was the first time I talked to you. That is when I started to differ with you. I stated I didn't differ much with you because I just didn't say you and I had it out, and about the phone call and about the testimony, we did not have much difference after that except that I was still maintaining Moran was not with me. The reason I maintained Moran was not with me was because he was not with me, and I didn't want to lie about it."

So your Honors perceive that when the prosecutors were *preparing* the Keeshin case for trial they endeavored to get Borrelli to testify that Moran was there. If Mr. Crowley is to be believed, Mr. Crowley released Moran because Mr. Crowley concluded that Moran was innocent, and here we have the spectacle of the prosecutors trying to get Borrelli to implicate an innocent man in order that Mitchell and Borrelli might corroborate instead of contradict each other in the trial of Keeshin.

Of course, it is obvious that when the prosecutors were attempting this subornation of perjury they were not free to make any attempt to change Mitchell's story very much because Mitchell had given his testimony in the civil suit. They did succeed in some way in getting Mitchell to say in the case at bar that his identification of Moran was only partial. This was shown to have been changed by Mitchell since the civil hearing because there he said he had identified Moran (Abst. 157). It is not true that when Crowley released Moran that Moran had been only partially identified. As we have said, your Honors know that identification was not essential anyhow if Moran's statement was voluntary.

Your Honors will notice that Messrs. Courtney and Crowley testified in detail about that meeting in Courtney's office with the defendant and his father, and neither of them denied that there was an effort made to get Bruce Borrelli to say that Moran was there. Mr. Napoli and Mr. Austin sat in court and heard these serious charges against them without a protest and without taking the stand. The natural thing for Mr. Crowley to have said in the conference of the 17th, in view of his explanation of the Moran incident, was to remind Borrelli that the Moran matter was all agreed upon before Moran was released, and that Bruce Borrelli had said then that he

(Bruce Borrelli) might have been mistaken. That is, such would have been the natural reaction if the prosecutors had not been so intent upon *preparing* the Keeshin case. Of course they didn't anticipate at the time that their dirty linen was to be washed in public either.

McNally, LaBarbera and Roche

We find from the record that indictment No. 42-125 was nolle by the prosecutor as to LaBarbera and Roche. LaBarbera and Roche and McNally were permitted by the State's Attorney to submit their cases in indictment No. 42-126 (Gottlieb conspiracy) to the trial judge by stipulation on the evidence in this record (Abst. 16), and each was fined one hundred dollars and no costs (Abst. 17). We contend that this action helps to prove that there was a deal.

McNally was positively identified by Roe as the man who struck him with a black jack (Abst. 254). The prosecutor was not obliged to compromise with and pamper McNally if they had not gotten themselves messed up in a deal with him. He rendered no service to the State insofar as this record discloses unless it be that the prosecutors purchased his silence.

Bear in mind that Borrelli testified that he explained the deal to LaBarbera and Roche in the restaurant. If no such deal existed, the State could have disputed it with these three parties said to have been in the deal. The prosecutors naturally would be anxious not only to show the court that Borrelli's confession was voluntary, that it was not part of a deal, but the prosecutors would naturally wish to defend themselves and show that Borrelli's serious charges were unfounded. They might claim here that McNally, LaBarbera and Roche had a right to

refuse to testify. That is true, but the prosecutors could have put them on the stand and demonstrated to the court that their refusal was the reason for the absence of their testimony. And your Honors must know that if there was no such deal and all the prosecutor needed was the truth from McNally, LaBarbera and Roche as to the circumstances of their arrest, and that if McNally, LaBarbera and Roche stood on their constitutional rights in the case at bar and refused to help clear the skirts of the prosecutors, the prosecutors would have reason not to feel kindly toward McNally, LaBarbera and Roche. The prosecutors would not have permitted them to escape with a hundred dollar fine without a protest and without a contest. If they had been compelled to choose to either testify or refuse to testify in open court, it is highly probable that the court would not have been so accommodating in the matter of the sentence if they had refused. The prosecutors evidently had every reason not to pry into the affairs of McNally, LaBarbera and Roche. The prosecutors did not dare to bring any pressure on LaBarbera and Roche to obtain their testimony.

The cases against LaBarbera and Roche were nolle in the case at bar (No. 42-125) (Abst. 16) before Keeshin went to trial and before the prosecutor knew that Borrelli was not going to be a State witness.

Your Honors will see from the record that the State first moved for a severance as to LaBarbera and Roche from Keeshin (Abst. 16). This motion was overruled by the court. If the motion had been granted they could have made it appear to the Keeshin jury that the cases were still to be tried against LaBarbera and Roche. But when the court would not permit this maneuver the State nolle against LaBarbera and Roche (Abst. 16). Anything to get Keeshin. The State did not dare to try to send

LaBarbera and Roche to the penitentiary on their confessions before the jury trying Keeshin. Keeshin would then have had witnesses to the fire escape deal. If Borrelli had remained with the State against Keeshin the usual course of accomplice testimony would cause the prosecutor to expect Borrelli to deny the fire escape deal. This record shows that the State has no other evidence against LaBarbera and Roche but their confessions or statements. Borrelli said in his confession (Abst. 144):

"He (Wassell) went out under his own power. LaBarbera was with me that night, he didn't do anything. He happened to be with me. I think just LaBarbera was with me that night. I don't think it could have been Roche too. Well, LaBarbera was with me that night and he didn't do anything, he happened to be with me."

Further (Abst. 145):

"I arranged to get Roche and LaBarbera to come over. I think Roche was there once in the car in the daytime. That was not the time Mitchell was beat up at two o'clock in the afternoon."

Further (Abst. 146):

"I was there by myself when Milich was beat up. That was not in the night time. LaBarbera was not there at the time. He was near the premises, he wasn't near us. Just Milich and I had it out, just outside of the gate. I beat up Wassell outside of the gate. LaBarbera was with me when I beat up Wassell. That night I drove over to the plant in my LaSalle car. He was in the neighborhood there when I beat these fellows up. He didn't hit anybody. Roche at the time he was with me didn't hit anybody. Moran didn't hit anybody when Mitchell was beat up. I think Moran was with me when Mitchell was beat up. I don't know what time in the afternoon that was."

Further (Abst. 149):

"I don't think I gave LaBarbera any money. It

is right that LaBarbera says he did it for me because he is a friend of mine and he owes me some favors, and I had gotten him a job. I got him a job, but I don't know the address. Roche does not owe me any money, this automobile will go back to the Motor Sales, and that will clear the money. I did not give Roche any money."

Further (Abst. 154):

"Moran was over to the Keeshin plant a couple of days with me when the strike was on, sitting in the car, a couple of days in a row. I think he was over there once when Roche was there. I could not be sure of the date."

If Borrelli had testified in the Keeshin case against Keeshin alone, this would furnish enough evidence for the prosecutors to claim that the conspiracy alleged was proved against Keeshin, LaBarbera and Roche. But they knew they could not dare risk the truth as to the confessions by putting LaBarbera and Roche on trial with Keeshin.

Your Honors know, of course, that if Borrelli had permitted the prosecutors to suborn perjury with him in the manner shown by the record and Borrelli had testified against Keeshin, then Borrelli would not have testified to any deal. Keeshin was not in the State's Attorney's office with Borrelli nor was he present at any of the conferences shown. Keeshin would have been helpless as far as witnesses to the deal are concerned. The police and prosecutors wouldn't admit there had been any deal. So the prosecutors nollod LaBarbera and Roche in order that the track might be clear for their intended subornation of perjury against Keeshin. Keeshin could not have gotten McNally, LaBarbera and Roche to testify for him because the State's Attorney had the Gottlieb indictments (Abst. 5, 12) over their heads. McNally, LaBarbera and Roche would have been insane to take a chance of antagonizing

the then State's Attorney and causing him to repudiate the deal as to them. The deal had not been carried out at the time of the trial below. The fact that the deal had not been consummated will answer any inquiry as to why Borrelli could not call McNally, LaBarbera and Roche in the present trial. We charge here that if the prosecutors were clean and had nothing to hide they would have tried LaBarbera and Roche with Keeshin. Just think of the value of their testimony. Borrelli would have put them in the conspiracy, and if they tried to deny the charge they would have been confronted by their statements. If they elected not to testify the State would have had the advantage of causing a large part of their case against all three to appear uncontradicted. The prosecutors know that the law permits them to prove conversations among conspirators in furtherance thereof, even in the absence of Keeshin.

Your Honors will bear in mind that Mr. Crowley swore in the case at bar (Abst. 108) that LaBarbera and Roche had made confessions:

"that those men (LaBarbera and Roche) had made a statement in the presence of a reporter telling the facts of the occurrence and stating that he, Borrelli, had secured them to go with him to attack this man Gottlieb in front of his home and that they had picked up the trail of Mr. Gottlieb downtown and followed him in a car out to his home and then he assaulted him brutally and attacked him and broke his jaw. I said, 'Both of them have now made statements. I would like to ask you some questions, Borrelli, about that occurrence. These men say that you were the one that got them into it and you in turn told them that you did it for Mr. Keeshin.'"

Your Honors know that if Mr. Crowley had any such statements he would have used them, as they not only dis-

puted Borrelli's present denial as to Keeshin but they showed the very conspiracy they were anxious to establish, *i.e.*, that promoted by Keeshin. The fact that the prosecution failed to use these statements and allowed LaBarbera, Roche and McNally to escape with one hundred dollar fines should demonstrate to your Honors that the prosecution could not afford to dispute the issue as to the various deals with LaBarbera, Roche and McNally.

Our interest in demonstrating the facts, insofar as they are shown by the record, is that the falsity of the confession is thereby demonstrated and the claim made by Borrelli that he is the victim of a repudiation of a deal is shown to have corroboration in the circumstances proved, including the conduct of the prosecutors.

The Telephone Call

Judge Borrelli made the charge from the witness stand that Tom Kelly (a lieutenant of police under Captain Gilbert) was trying to frame his son (Abst. 96). Kelly did not take the stand, and the evidence in substantiation of this charge is practically undenied. Crowley and Courtney, the former State's Attorney, endeavored in their testimony to belittle the matter, but your Honors will agree that this is not only a serious charge, but its truth corroborates the defense theory here, *i. e.*, that the prosecutors were intent upon fabricating a charge against Keeshin and secured the confession from Borrelli by illegal means as a mere step in their main plot. The charge made here in open court that the prosecutors were intent upon suborning perjury against Keeshin can not be belittled or ignored.

The importance of our ability to prove by the record that the prosecutors conspired to suborn perjury is that such proof corroborates the testimony of Borrelli that Gilbert

told him to tell the grand jury that Keeshin was to blame and that in such event Borrelli would be free. Gilbert denied that he gave Borrelli any such instruction, and if it were merely the word of one against the other the court might be unwilling to give credence to such a serious charge against public officials. But when the record shows that the purpose of the prosecutors from the start was to convict Keeshin, the instructions given by Gilbert are recognized as but a step in the scandalous proceedings.

Permit us to examine the facts. We first call attention to Borrelli's testimony before the grand jury upon the subject of the telephone call (Abst. 120).

These questions and answers appearing in the transcript of Borrelli's grand jury testimony were read to Mr. Crowley on cross-examination when he appeared as a witness in the case at bar (Abst. 120). It appears that they are all of the questions and answers upon the subject, and as Courtney and Crowley did the questioning before the grand jury it is fair to assume that when the matter came up again in conference on April 17th they knew what Borrelli had sworn to before the grand jury. The grand jury testimony was read to Borrelli at the conference (Abst. 115). It is fair also to assume that at the time Borrelli was questioned before the grand jury there existed no statement, memorandum or fact within the knowledge of Courtney and Crowley suggesting anything further or different information than their questions imply. In other words, if Messrs. Crowley and Courtney had had a memo from Kelly to the effect that Borrelli had called River Forest and had held the conversation, Crowley and Courtney would have asked questions before the grand jury based upon the memo.

Courtney and Crowley had Keeshin before the grand jury twice that day, once before Borrelli testified and once

just after. It is fair to assume that they asked Keeshin if he talked to Borrelli and that Keeshin denied any conversation which would indicate guilty knowledge upon his part. So the prosecutors had every reason to doubt the fact that any such conversation ever occurred, as later concocted by Kelly and claim by him to have been reduced to writing. As a matter of record, Mr. Napoli cross-examined Mr. Keeshin in the case at bar concerning the telephone calls and read from Mr. Keeshin's grand jury testimony (Abst. 233, 234, 235). It is fair to assume that Mr. Napoli read all he had upon the subject and this is probably all Courtney and Crowley had, plus conversations with Gilbert. Your Honors will notice the persistence of the above examination of Borrelli before the grand jury.

The testimony given by Borrelli in the case at bar concerning the telephone call is shown by the record (Abst. 166):

Borrelli was on the stand twice, once in the preliminary hearing as to the admissibility of the confession (Abst. 48) and again after the confession had been introduced into evidence (Abst. 164). During his first examination upon the preliminary hearing the court said (Abst. 68):

"The Court: There is no question about it, he made that statement (the grand jury confession). The only question before me now as I understand it is whether it was given voluntarily or under promises. I am not passing upon the veracity of it now. I will hear the argument at the conclusion of this hearing, whether or not it is admissible."

Judge Borrelli testified (Abst. 92) to a conference requested by the State's Attorney.

We ask why should there be a statement by the prosecutor to father or son that they had a strong case against Borrelli if there had not been some talk by some one of a

weak case? Mr. Napoli, who is said to have made the remark about the weak case, did not take the stand. It is probable that Mr. Napoli could not think of any reasonable explanation as to why he attended this conference on the 17th, and didn't say that he had checked up some days before and had found that there had been no phone call to River Forest. The inescapable conclusion is that Crowley, Courtney, Napoli and Austin were trying to force Borrelli to conform in his testimony with the fake memorandum made by Kelly. It is obvious that the fake memorandum would have been used by Kelly as a witness against Keeshin, if Borrelli had gone along with the prosecutors.

To say that this all didn't mean anything is to insult the intelligence of Kelly, who knew the importance of this connecting link between Borrelli and Keeshin. The prosecutors admit that they knew it was a fake, yet they persisted in trying to force Borrelli to conform with the Kelly memo. Courtney did not deny that he told Judge Borrelli to come to his office because Bruce Borrelli was in trouble about his statement. What trouble, may we ask, if this talk about the telephone call was an unimportant detail, as now claimed by the prosecutor? Your Honors will note that Courtney phoned Judge Borrelli on April 8th (Abst. 92). The conference in Mr. Courtney's office didn't take place until April 17th. So it was not just a mere detail that came up suddenly to be checked and investigated at a later date in the office of the State's Attorney.

Judge Borrelli testified (Abst. 92):

"Then something was said about a supposedly made telephone call by Bud to Mr. Keeshin. Bud said, 'I never made such a call.' Mr. Napoli said, 'Well, if that is going to be his testimony, then we have a very weak case.' Courtney pointed his finger at my son and in an angry tone of voice said, 'Bud, we have

a good case against you,' and my boy wanted to talk. I said, 'Keep quiet, Bud, I will do the talking here.' I says, 'Mr. Courtney,' I said, 'my son is going to tell the truth and nothing else, he is not going to lie for anybody.' Finally Mr. Napoli here went on and by the way, may I ask Mr. Napoli to produce that paper that was signed by Tom Kelly, addressed to Mr. Dan Gilbert, as to what he is supposed to have heard over the telephone? It is a conversation between my son and Mr. Keeshin, in River Forest; may I have that paper, Mr. Napoli, please?

"Mr. Napoli: This is the first time I ever heard a witness demand papers, your Honor.

"The Witness: Well, it is a memorandum and it is part of the conversation, Judge.

"Mr. Austin: The defense is in no position to demand access to the State's Attorney's file.

"The Court: There is no motion before me.

"Mr. Stewart: I am asking—

"The Court: I am not trying your case.

"Mr. Stewart: I am asking your Honor to order the State's Attorney to allow me to have now a certain memorandum that has been referred to by the witness, as I understand it, the memorandum was made by one of the police officers to another, that a phone call had been made by Bud Borrelli to River Forest to Mr. Keeshin.

"The Court: You mean that was exhibited at that time?

"The Witness: Yes.

"Mr. Stewart: Exhibited to these folks here.

"The Witness: And I saw it.

"The Court: If there is such a memorandum, let him have it.

"Mr. Napoli: Judge, there is nothing in this testimony with reference to any such memorandum that has any bearing on the question your Honor is now hearing.

"Mr. Stewart: Well, Mr. Napoli, was there such a memorandum?

"Mr. Napoli: It happened long after the grand jury hearing.

"Mr. Stewart: Was there such a memorandum, Mr. Napoli?

“(Discussion between counsel.)

“The Court: If there is such a memorandum there, it may be produced.

“Mr. Austin: We have no such memorandum here, your Honor.

“Mr. Stewart: It is Mr. Napoli that should answer and not Mr. Austin.

“Mr. Napoli: We have no such memorandum. I don't have the memorandum now. That is just what I said, I don't have the memorandum.

“Mr. Stewart: Possibly you can tell his Honor, you remember what was written on the memorandum or what was read to them from that memorandum?

“The Witness: Will you ask Mr. Napoli if there was such a memorandum?

“Mr. Stewart: He does not deny it.

“Mr. Napoli: I respectfully submit, your Honor, that the witness, he is a witness and not a lawyer.

“Mr. Stewart: He does not deny it though, he does say that he does not have it with him.

“The Court: Objection sustained.”

We quote from the testimony of Judge Borrelli (Abst. 95):

“When I saw the memorandum, it was Mr. Courtney that handed it to me, just to look at it, I saw Tom Kelly's name signed to it. I said, ‘If Bud had made this telephone call, Mr. Kelly would have gotten the number, why didn't he put the number here, only what he said in the statement,’—that he listened in and heard Bud Borrelli call up a River Forest number, that he heard Bud say to Keeshin over the telephone, I am giving the substance of it now although the original would tell just what was said, and Bud said to Keeshin, ‘I am in jail here, please come help me out;’ that Keeshin replied, ‘Sit tight, don't talk, those fellows down there in the State's Attorney's office are not your friends;’ words to that effect, ‘they are no good.’ That is the substance of the memorandum. I said, ‘Wouldn't Mr. Kelly be able to get that telephone number that was called in River Forest because it is a toll call, if he had heard that telephone

conversation, that very moment or a few moments later he could have gotten it from the telephone company.' Finally, Mr. Napoli said, 'Mr. Courtney, I have investigated about that telephone call, that did not happen, there was no call made to River Forest that night or any other time.' Mr. Crowley spoke up, he said, 'I believe Bud Borrelli is telling the truth.'"

We submit that under the circumstances the court should have enforced its order to produce, and the prosecutors should not have been permitted to evade by stating that the memorandum was not there at that time. It should have been produced. And when Mr. Napoli told the trial judge that it had no bearing Mr. Napoli was in error.

If any authority be required we cite Wigmore on Evidence, 3rd Ed., sec. 2223, p. 218:

"It seems wise to stand firm upon ordinary considerations of fairness, and hold that the prosecutor is not entitled at the trial to withhold from the inspection of the accused and jury any documents or chattels relevant to the case."

The inquiry into the circumstances surrounding the making of the confession properly included that which occurred after the testimony was given in support of the serious charge made by the defendant that he was a mere pawn in a much bigger game against Keeshin. To put it bluntly, Kelly was accused of fraud by Judge Borrelli and by his son.

But it may be claimed by the State here that all of these charges of misconduct on the part of the prosecutors relate to a time subsequent to the confession. It seems logical to us that the misconduct demonstrates the truth of all of the charges made by Borrelli, including his claim of prior misconduct and prior pressure and prior promises. Our Supreme Court recognized the logic of a claim such as ours in *People v. Heide*, 302 Ill. 624, 628.

Another circumstance showing that the prosecutors had promised Borrelli consideration and benefits if he did as they wished and testified before the grand jury against Keeshin occurred just after Borrelli left the grand jury room. Mr. Crowley testified (Abst. 113):

"Then Judge Borrelli said to me, 'Mr. Crowley, I think that I would like to get Bruce away for about a couple of weeks or three weeks.'

"He said, 'I would like to take him away to Florida.' He said, 'This thing has got him quite upset.' He said, 'Would you have any objection?' 'Well,' I said, 'I would have no objection because I don't suppose that this matter will come on for hearing much before that space of time, but he should be here tomorrow at least to complete in detail his statement, and after that we are not concerned.' 'Well,' he said, 'how about his bond on the indictment?' 'Well,' I said, 'the bond would be fixed at the usual bond, approximately \$3,500,' and 'Oh,' he said, 'I can make that all right,' but he said, 'the only thing is the capias, would the capias be served, or would they act to serve the capias?'

" 'Well,' I said, 'Judge, I will tell you what we can do to accommodate you; he is going to be here tomorrow morning, suppose you have his lawyer apply to the Chief Justice of the Criminal Court in connection with the habeas corpus bond that he is on now and continue that habeas corpus writ for a period of three weeks and he will be at liberty on that habeas corpus bond; and then we will request the sheriff to hold the capias until the date of the habeas corpus writ is made returnable and in that way he will be at liberty on bail,' and the Judge said, 'Well, I appreciate that very much,' and that in substance was the conversation had there at that time."

Contrast this consideration with the manner in which the prosecutors treated Keeshin. Courtney arbitrarily ordered Gilbert to lock him up. They had no warrant, the grand jury had not acted. This was illegal and harsh and having

been done in such an arbitrary manner it is only fair to assume that Judge Borrelli and Bruce Borrelli knew of Keeshin's fate and were seeking consideration, which was afforded. And also contrast the kindness and consideration shown Bruce Borrelli with the conduct of the State's Attorney as soon as it was learned that Borrelli refused to testify against Keeshin. They immediately moved to advance his case for immediate trial and moved to raise Borrelli's bond so high that they hoped he would be unable to furnish bail and would be compelled to face trial while in jail.

Concerning Devlin

We must examine the record as to Devlin because our Supreme Court finds him to be a conspirator and from the premise concludes that a conspiracy was established by circumstantial evidence. We submit that there is no such proof.

John Devlin was not apprehended, and after the trial below his case was stricken (Abst. 16). The court absolved Keeshin (Abst. 239) but held that (Abst. 239):

"The State proved beyond a reasonable doubt that these three employees were slugged and beaten by the defendant as a result of a conspiracy with Roche, LaBarbera and Devlin, because of their agitations and disturbances."

This opinion rejects the confession of Borrelli as to Keeshin as being false. It is our contention that there is no evidence to be found in the record, including the confession, to prove the guilt of Devlin. There is very little against LaBarbera and Roche. Mr. Crowley claimed from the witness stand that he released Moran because he believed him innocent. If such were the truth, we ask why did he bring about the indictment of Devlin? The prose-

cutors put Devlin in the indictment to make it appear that the sluggings were ordered by the higher-ups. Devlin was the boss. We shall now set out every scintilla of evidence against Devlin to demonstrate the error of the trial court as well as that of our Supreme Court. We hold no brief for Devlin, LaBarbera, Roche, McNally, Keeshin or anyone but Borrelli. Our object is to demonstrate the error of the trial court. Your Honors know that Borrelli could not conspire with himself.

Mitchell told (Abst. 18) the manner in which Devlin suggested the formation of a committee consisting of five men, Happy, Frank Carrelli, Mike Sikowsky, John Milich and Mitchell. The theory of the State and the finding of the court is that Mitchell, Milich and Wassell were struck and beaten because of their labor agitations and disturbances. Permit us to point out that three out of five on the committee were unharmed and that Wassell was not on the committee or shown to have been active. Milich said on cross-examination (Abst. 38):

"I didn't have any union trouble at Keeshin's."

The only source in the record for such a finding as to LaBarbera and Roche must come from the confession. If the confession be rejected as untrue or as involuntary, there is nothing left. The confession does not put Devlin in any conspiracy. The conversations and doings of Devlin as related by Mitchell, are consistent with innocence.

John Milich (Abst. 32) also told of Devlin being the boss and what he said and did in the matter of the strike, nothing which would support the indictment or any criminal charge. Devlin told Milich someone outside wanted to see him, but such information can not be tortured into a showing that Devlin knew that those men intended to strike Milich.

Wassell said (Abst. 44):

"The only dealings I had with John Devlin out there was that he was the boss. And he had nothing to do with anything that was troubling me."

In the confession Borrelli said (Abst. 144):

"I don't know if Devlin sent Milich down off of the platform to me. I asked a number of employees who they were. I met Devlin there. I didn't know anything about Devlin telling Johnny Milich to go to my car. I didn't ask Devlin where Milich was."

Further that (Abst. 151):

"I never talked to Devlin about any of the matters of the beating up. I didn't say I knew Devlin sent anybody out. I didn't know he sent Milich out to me."

Without Keeshin There Is No Case.

The trial court absolved Keeshin and there is not a scintilla of evidence to be found in the record, outside of the confession, to involve Keeshin.

Mr. Crowley testified that after Borrelli finished his testimony before the grand jury that he requested him to return the next day to "complete in detail his statement" (Abst. 113). If such a statement was made it was never produced. Your Honors might examine Borrelli's testimony as given before the grand jury (Abst. 141, Rec. 271; Abst. 258, Rec. 50). The lack of detail is significant. Mr. Crowley testified that he told Borrelli he had statements from the other defendants (Abst. 108):

"These men say that you were the one that got them into it and you in turn told them that you did it for Mr. Keeshin. Will you make a statement before a court reporter?"

Yet we find no questions asked of Borrelli along the line of tying the conspiracy up with these men and with Kee-

shin. Mr. Crowley gave no explanation at the trial as to why Borrelli was not asked the details before the grand jury. If his confession were voluntary and if it were true it would have been a simple matter, it seems, to have him tell the grand jury the important details. A prosecutor with a great deal less experience and skill than that of Mr. Crowley's would want to know where and when the arrangement was made, when Borrelli first contacted La-Barbera and Roche, what he told them of the plan. An experienced prosecutor would develop a few facts to be corroborated by McNally and others.

The fact seems to be that Keeshin was not in the conspiracy and that when Borrelli said Keeshin told him what to do before the grand jury the prosecutors accepted his bare statement before that body. If the other defendants were in the conspiracy there are no questions asked of Borrelli to indicate any fact which might show its existence.

Without the confession there is no proof of any connection between the assault upon Milich with that made upon Mitchell or with the assault upon Wassell. In the confession, the only connecting link is the bare statement by Borrelli that Keeshin gave Borrelli the three names. This was rejected as false by the trial court. Borrelli testified that each was a separate affair brought about by the circumstances of each case as to Milich, Mitchell and Wassell. The court found (239) that:

"Also, defendant's contention that he assaulted the prosecuting witnesses in self-defense, resulting from his investigation of their criminal records or personal involvements, is preposterous and unworthy of belief."

This claim made by Borrelli before the grand jury is what Mr. Napoli termed as hedging a little bit (Abst. 115). Your Honors know that if the confession be rejected and the explanation given by Borrelli be rejected no one has a

right to substitute still another theory without evidence. This matter of self defense was discussed in the conference held in Mr. Courtney's office on April 17th (Abst. 114).

If Borrelli were on trial for any one of the assaults it would be a simple matter to determine the facts from a consideration of the testimony of the victim and to reject self serving portions of the confession. But in the present situation where the assault is supposed to be only a minor portion of the main charge of conspiracy, the falsity is significant in determining the voluntariness and truth of the confession. If in fact the victims did absolutely nothing to justify Borrelli and Borrelli told untruths to the grand jury in this regard this falsity shows that Borrelli was afraid to trust Gilbert fully. He knew that Gilbert was not to be trusted because he had double crossed Borrelli on the fire escape deal. Borrelli knew at the time of giving his grand jury testimony that Courtney and Crowley were after Keeshin. That Courtney and Crowley would be satisfied so long as Borrelli said Keeshin told him to do it, so Borrelli figured that he might as well protect himself in describing the part he (Borrelli) took in the beatings. Borrelli at the time he gave his grand jury testimony did not realize that his testimony against Keeshin would be of more value to the prosecution if the assaults were shown to be wanton and inexcusable. When the prosecutors all ganged up on him and drew his father in in an effort to make him implicate himself more deeply, is it any wonder that he asked what was to become of him?

Earlier in his deals with Gilbert, Borrelli said (Abst. 70):

"After he summed up the whole thing telling me they were to get \$100 and costs and I was to go on the street, that there was not to be any newspaper publicity, and he assured me my father's name wouldn't be mentioned, and after we got all through,

I said, 'What about Keeshin, you are talking about Keeshin there?' He said, 'Keeshin is a big business man, you will see something, he will come in here in my office and deny having anything to do with it, he is a big business man, we won't be able to hold him, and that is all there will be to that.' "

Gilbert did not deny giving Borrelli this false prediction. Gilbert must have known that Keeshin would deny it but Gilbert knew that would not be the end of it. If such a termination to his investigation had been in Gilbert's mind there would have been no purpose in the fire escape trip. Borrelli came to distrust everything said by Gilbert and everybody connected with Gilbert. When the trial judge said that the self-defense claim was preposterous the trial judge overlooked the significance of the falsity of the confession.

We contended that as a matter of law the trial court is not permitted to reject the testimony given by Borrelli in the trial and his testimony before the grand jury and then substitute some version not based upon the evidence. The agreement between conspirators constitutes the *corpus delicti*. There is no proof of this important element of the crime outside of the repudiated confession. As your Honors know, the *corpus delicti* can not be proven by confession alone. (*Wistrand v. People*, 213 Ill. 72, and see note, 68 L. R. A. 33.)

As your Honors know, the essence of a conspiracy is not the accomplishment of the unlawful object, but it is the unlawful combination or agreement (*People v. Drury*, 335 Ill. 539). This is the *corpus delicti*. We contend that there was no proof of the *corpus delicti* in either case at bar. We quote from the opinions of the trial court indicating that the judge lost sight of the conspiracy charge and punished Borrelli for the acts of violence (Abst. 239). The trial judge said:

“Such labor terrorism and violence must be halted if we are to maintain an orderly society.”

In the case at bar, the only evidence as to the commission of any crime, aside from the confession of Borrelli, consists of the testimony of various separate victims of assaults rather than circumstances showing any agreement or combination. And further, in the cases at bar, if the confession be looked to for proof of the *corpus delicti*, it will be found that the only agreement confessed was with Keeshin, and that part of the confession was proven to be false and so found by the trial court.

Former Jeopardy

The constitution of Illinois (Art. II, section 10) provides that no person shall be twice put in jeopardy. This defense is proper under a plea of not guilty (*People v. Greenspaw*, 346 Ill. 484, 486).

The defendant claimed that after he was convicted in 42-125 and acquitted in 42-127 that he could not be again put in jeopardy in No. 42-126 (Abst. 274, 279 (17)).

When the question of former jeopardy is presented at a second trial the question of identity of offenses can be inquired into by an inspection not only of the former judgment but of the pleadings and the evidence and all matters which may disclose the real situation (*Harding Co. v. Harding*, 352 Ill. 417; *Neil v. Chavers*, 348 Ill. 326; *Petition of Blacklidge*, 359 Ill. 482; *Hoffman v. Hoffman*, 330 Ill. 413; *Smith v. Auld*, 31 Kan. 262, 1 Pac. 626, 628; *Davis v. People*, 22 Colo. 1, 43 Pac. 122).

The test as to whether the facts pleaded or proved constitute a former acquittal or conviction sufficient to bar a subsequent prosecution is whether the facts charged in the

later indictment would, if found to be true, have justified a conviction on the earlier indictment. If they do, then the judgment on the earlier indictment is a complete bar to a prosecution on the other indictment, otherwise not (*People v. Bain*, 358 Ill. 177, 190; *People v. Mendelson*, 264 Ill. 453).

An examination of this record will show that the same evidence was used in all three cases. The trial judge allowed evidence of the assault on Gottlieb in the first case (Abst. 108, 134). The trial court did not adhere to the specific charge in the indictment. As your Honors know Borrelli, under his plea of not guilty, was entitled to prove any defense to the charge, including that of former jeopardy and acquittal (*People v. Greenspaw*, 346 Ill. 484, 486).

Our Supreme Court rejected this point as unfounded (R. 27). Of course, if all of the cases are alike in their essentials, petitioner was denied due process of law. He was acquitted in one case (Abst. 14, 276), before the finding of guilt as to the Gottlieb matter.

Good Reputation of Defendant

The following are character witnesses who testified to the good reputation borne by the defendant as a law abiding citizen and for truth and veracity (Abst. 203):

- “540 Charles Weinfeld, 6746 Bennett Avenue, Chicago. Lawyer associated with the firm of Schuyler, Weinfeld & Hennessy, with offices at 10 South LaSalle Street, Chicago.
- “542 Anthony Kamenjarin, 5225 Dorchester, Chicago. Real estate broker with the firm of Kamenjarin & Company, owned by self.
- “543 Mrs. Sarah Cassidy, 6916 Clyde Avenue.

- "544 Frank J. Cassidy, 6916 Clyde Avenue. City fireman. Chicago Fire Department.
- "545 C. V. Essroger, hotel Del Prado, 53rd and Hyde Park Boulevard. Treasurer of Pawlowsky Sound System, 540 North Michigan Avenue.
- "547 Joseph E. Maulella, 3544 Jackson Boulevard. Druggist at 1160 Taylor Street.
- "548 Peter Miller, 2571 East 71st Street. Real estate business at 67th and Stony Island Avenue.
- "549 Dr. S. C. Hogan, 6746 Cregier Avenue. Physician and surgeon with offices at 2376 East 71st Street.
- "550 John Irwin, 6900 Clyde Avenue. No occupation. Formerly in the packing business with the concern Irwin Brothers.
- "551 Michael D. Dolan, 7226 Luella Avenue. Lawyer, with offices at 140 North Dearborn Street.
- "552 J. J. Pass, 4940 East End Avenue. President of National Steel & Copper Plate Company at 700 South Clinton.
- "553 Bernard J. McCabe, 8040 Yates Avenue. Sales representative for the Shell Oil Company.
- "555 Dr. William Wood, 4932 Lake Park. Office at same address.
- "556 Mrs. R. J. Devitto, 8137 Phillips Avenue. Husband works as salesman for the Buda Company.
- "557 Chester J. Hall, 2203 West 110th Place. Salesman for the Holliston Mills.
- "558 Joseph Orrico, 3553 Jackson Boulevard. Lawyer, with offices at 10 North Clark Street."

The state produced no witness on this issue and did not question the fact that the defendant had borne such a good reputation. The Honorable John A. Sbarbaro, Chief Justice of the Criminal Court, also gave testimony to the good character of the defendant (Abst. 213).

In the Gottlieb cases the testimony of the character witnesses was introduced again by stipulation.

While evidence of good reputation is not proof of innocence it cannot be entirely disregarded and may be sufficient to raise a reasonable doubt of guilt (*People v. DeSuno*, 354 Ill. 387).

Although Borrelli is not entirely blameless in his conduct as admitted by him, there is considerable difference in moral turpitude between individual difficulties which may have arisen between Mitchell and him and others and in a conspiracy with Keeshin for which he was supposed to be tried. In a determination of this issue we submit that his good character should bear weight. Our Supreme Court makes no mention of the good character of the petitioner.

Conclusion.

We submit that the trial court not only erred in admitting the confession, but after it was admitted the court erroneously refused to consider the evidence attacking the voluntariness of the confession in determining the weight to be given to the confession. In correctly determining that Keeshin was not in the conspiracy, the trial court overlooked the failure of proof as to the existence of any such conspiracy as that charged. After the trial court eliminated Keeshin, the Supreme Court put Keeshin back into the conspiracy in order to find another conspirator to satisfy the law requiring proof of the *corpus delicti*. This we submit finds no support in the record. The trial court punished Borrelli for the substantive offenses. The court was of the opinion that promises made by Judge Borrelli were by one not in authority, and further that promises of freedom and probation, even if made by Captain Gilbert and the prosecutors, are of no legal significance be-

cause the officials had no power to carry out the promises. The court overlooked the real reason for the exclusion of confessions, the effect upon the mind of the confessor. A trial filled with so many misconceptions could not be regarded as a fair trial, or due process as guaranteed by the constitutions and laws of this State and the fourteenth amendment to the constitution of the United States. As our Supreme Court said in *People v. Martin*, 382 Ill. 192, if it be urged that the prosecution of plaintiff in error is made more difficult, the fault does not grow out of the provisions of the constitution, but from a disregard of such provisions by the officers sworn to support and enforce them.

It is respectfully prayed that the writ of certiorari issue and that the judgments be reversed.

Respectfully submitted,

Wm. Scott Stewart

WM. SCOTT STEWART,

Counsel for Petitioner.